***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

# BRIEF ON BEHALF OF APPELLANT, MARYLAND CASUALTY COMPANY

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,802

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United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 12 1964

Nathan J. Paulson
CLERK

MARYLAND CASUALTY COMPANY,

Appellant

v.

AMERICAN GENERAL INSURANCE COMPANY, et al,

Appellees

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On Appeal from the
United States District Court for the District
of Columbia

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## STATEMENT OF QUESTIONS PRESENTED

The question is whether the District Court abused its discretion in refusing to grant a preliminary injunction prohibiting American General Insurance Company from proceeding with an offer to the stockholders of Maryland Casualty Company to exchange shares of stock of American General for their shares in Maryland.

The subsidiary questions are:

1. Did the District Court act arbitrarily in finding that Maryland had failed to show irreparable injury if American General is permitted to proceed with the exchange offer?

2. Did the District Court act arbitrarily in failing to balance the injury to Maryland and its stockholders and to the stockholders of American General in case the injunction were refused and the exchange was later found to violate the antitrust laws against the injury to the stockholders of Maryland and to American General from the issuance of the injunction in case the exchange offer were later held not to violate the antitrust laws?

3. Did the District Court act arbitrarily in finding that Maryland had failed to meet the burden of showing that the proposed acquisition by American General of Maryland's stock would probably violate the antitrust law?

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## SUBJECT INDEX

TABLE OF CASES



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* Cases chiefly relied upon are marked by asterisks.

## STATUTES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,802

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MARYLAND CASUALTY COMPANY,

Appellant

v.

AMERICAN GENERAL INSURANCE COMPANY, et al,

Appellees

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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# BRIEF ON BEHALF OF APPELLANT

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## JURISDICTIONAL STATEMENT

On July 7, 1964, the plaintiff (appellant here), Maryland Casualty Company ("Maryland"), filed a complaint in the United States District Court for the District of Columbia against American General Insurance Company ("American General") and certain of its subsidiaries charging that the proposal of American General to acquire control of Maryland through an offer to Maryland's stockholders of shares of American General stock in exchange for their Maryland shares would violate Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18. In addition to prayers for a permanent injunction and recovery of treble damages, the complaint prayed for immediate relief in the form of a temporary restraining order and a preliminary injunction enjoining the defendants (appellees here), pending final determination of the action, from proceeding with the proposed exchange of stock.

On the day the complaint was filed, a temporary restraining order was issued and a hearing on the prayer for issuance of a preliminary injunction was set for July 15, 1964. After hearing, the district court, (McGarraghy, J.), on July 27, 1964, entered an order denying the preliminary injunction sought by Maryland and permitting the defendants to make the proposed exchange offer.

Judge McGarraghy's order enjoined the defendants from:

1. Transferring to any other person, firm or corporation any shares of the common stock of Maryland acquired by any of the defendants through the proposed exchange offer or otherwise, except pursuant to an order of the district court,

2. Merging or consolidating Maryland or any of its subsidiaries or affiliates into or with American General, or any of its subsidiaries or

affiliates, or with any other concern, and from merging or commingling the assets of Maryland with those of American General, or of any of its subsidiaries or affiliates or with the assets of any other company,

3. Voting any or all of the common stock of Maryland acquired by the defendants or any of them by or through the proposed exchange offer or otherwise for the election of any persons as directors of Maryland except such persons as may be designated or recommended by the president and chief executive officer of Maryland,

4. Using or voting any stock of Maryland acquired by any of the defendants by or through the proposed exchange offer or otherwise to prevent or to interfere with Maryland entering into the life insurance business, and

5. Using or voting any stock of Maryland acquired by any of the defendants by or through the proposed exchange offer or otherwise to change or interfere with the operations, practices, policies, customs, field and agency personnel and home office personnel of Maryland Casualty Company.

This order had been expressly consented to by the defendants who tendered a proposed preliminary injunction (Df. Ex. 8) which the district court adopted in haec verba.

The case is here on Maryland's appeal from that portion of the order of the district court which refused to enjoin American General from proceeding with the proposed exchange offer. Jurisdiction of this court is based on 28 U.S.C. 1292(a)(1). The district court had jurisdiction by virtue of 28 U.S.C. §1337 and 15 U.S.C. §§15, 22 and 26.

## STATEMENT OF THE CASE

Plaintiff, Maryland, is a Maryland corporation organized in 1898 with its principal office and place of business in Baltimore (Pl. Ex. 11-A, p. 41). Maryland and its affiliated companies in the Maryland Group for many years have been, and are now, engaged in interstate commerce as a multiple line insurance company (Tr. 30). One or more members of the group are licensed to do and are doing business in all of the states of the Union and in the District of Columbia, and taken together they have more than 17,000 agents and producers (Tr. 32; Pl. Ex. 29). Their premium volume for the year 1963 was $208,091,547 (Pl. Ex. 11-A, p. 14). Their business includes property insurance of all types, including fire, casualty, surety, fidelity, inland marine, and accident and sickness (Tr. 30) and they are rated among the top twenty-five property and casualty insurance companies in the United States (Df. Ex. 6, Ex. 1).

American General is a Texas corporation with its principal office in Houston (Pl. Ex. 11-A, p. 25). The other defendants are subsidiaries of American General and are engaged in interstate commerce (Pl. Ex. 11-A, p. 26). American General was originally organized in 1926 and has since that time been engaged in interstate commerce in the property and casualty insurance business (Pl. Ex. 11-A, p. 25). By numerous acquisitions, it has acquired a controlling interest in companies engaged in the business of life, accident and sickness insurance, as well as additional property insurance companies (Pl. Ex. 11-A, pp. 25-27). For 1963 the surety and casualty premium volume of the American General Group was $29,669,223 with 93.4% of such property and casualty insurance premiums being written in the

two states of Texas and Oregon; the life insurance premiums written by the group during the same period totalled $57,973,244 with 67.4% of the life insurance premiums being written in the two states of Texas and Pennsylvania (Pl. Ex. 11-A, p. 14). One or more members of the American General Group are licensed to do and are doing business in 42 states and the District of Columbia (Pl. Ex. 11-A, p. 2).

The American General fire and casualty companies are qualified to do business in 21 states and the District of Columbia, and are in direct competition with one or more members of the Maryland Group in 16 states and the District of Columbia in property and casualty insurance (Pl. Ex. 11-A, pp. 2, 14). In the states in which they compete in property and casualty insurance, the direct property and casualty premiums written by the American General Group in 1963 amounted to $29,669,223, and the direct property and casualty premiums written by the Maryland Group amounted to $69,576,607 (Pl. Ex. 11-A, p. 14). The American General Group and the Maryland Group are in direct competition in accident and sickness insurance in 42 states (Pl. Ex. 11-A, p. 2). The direct accident and sickness premiums written by the American General Group in those states in 1963 amounted to $6,177,000 and by the Maryland Group amounted to $3,132,685 (Pl. Ex. 21, p. 2).

In recent years there has been a growing trend in the insurance industry for increasing amounts of life insurance to be written or brokered by agents primarily engaged in handling property or casualty insurance (Tr. 34, 80, 94, 109, 205, 219, 241). In March of 1962 Maryland's management directed a survey to be made to determine the extent to which Maryland's agents, located in every state of the Union and the District of Columbia,

were actually handling life insurance (Tr. 33, 283-84; Pl. Ex. 1). As a result of this survey it became apparent that a substantial number of its agents were so engaged and that the volume of life insurance business which they were placing was more than $418,000,000 a year of life insurance in force (Tr. 34, 284). Maryland thereupon determined to enter the life insurance business at the earliest practicable moment, and to that end, in July 1962, caused to be organized a wholly-owned subsidiary, Life Insurance Company of Maryland, Inc., a Maryland corporation (Tr. 34, 286). Further development of this program was interrupted as a result of the acquisition by Maryland of substantially all of the stock of Northern Insurance Company of New York, a company engaged in the business of writing property and casualty insurance (Tr. 36-37; Pl. Ex. 11-A, p. 42). This company had previously sustained heavy underwriting losses and the problems which followed upon this acquisition absorbed the full energies and resources of Maryland for the time being (Tr. 37, 631).

William G. Middendorf of the firm of Middendorf, Colgate & Company, a New York brokerage firm, had been the moving factor in bringing the Northern Insurance Company to Maryland's attention and had been paid a commission by Maryland for doing so (Tr. 142). In September 1963, Middendorf suggested to representatives of Maryland the possibility of an affiliation between Maryland and the American General (Tr. 39-40) and at Middendorf's request, discussions took place between representatives of the two companies (Tr. 41; Df. Ex. 3, p. 2). These discussions were broken off by Maryland in December, 1963 (Tr. 44). Up to that time it had not been suggested that American General should acquire control of Maryland.

Immediately thereafter, Maryland came under strong pressure from its largest stockholder, Insurance Securities Incorporated (ISI) (Tr. 44). ISI, a California corporation with its principal place of business in San Francisco, was formed in 1938 for the purpose of sponsoring Insurance Securities Trust Fund, an open-end, diversified investment trust, and has served over the years as administrator, investment adviser, principal underwriter and, more recently, principal broker for the Fund (Pl. Ex. 17, pp. 2, 6). Insurance Securities Trust Fund holds stock interests having a total market value in excess of $1,000,000,000 in more than 90 insurance companies doing business in the United States and is the holder of approximately 10% of the stock of Maryland Casualty Company and 6.6% of the stock of American General (Tr. 132, 197; Pl. Ex. 16, pp. 15-17; Pl. Ex. 11-A, p. 12). As early as December 1961, a Vice-President of ISI had suggested to officers of Maryland the possibility of an affiliation of Maryland and American General (Tr. 37-38).

On December 23, 1963, the Chairman of the Board of ISI, Leland Kaiser, called the President of Maryland, H. Ellsworth Miller, to inquire why Maryland was not interested in the affiliation (Tr. 45). Miller informed him of the reasons why Maryland did not think the affiliation would be advantageous or proper (Tr. 45), whereupon Kaiser said that Maryland no doubt would hear further from ISI (Tr. 46). The next day Maryland received a telegram from ISI stating that immediate consideration by Maryland's board of directors was deemed essential by ISI and advising that the position of ISI was that the proposed deal was attractive to shareholders of both companies and that Maryland's objections might have merit but were not controlling (Tr. 46; Pl. Ex. 2).

During a trip to the West Coast on other business of Maryland, Miller met with Kaiser and other officials of ISI on January 9, 1964 (Tr. 48). Miller again explained why Maryland felt that the affiliation would not be advantageous and Kaiser said that he didn't feel the reasons had much merit (Tr. 48). Kaiser further stated that if the affiliation appeared to ISI to be advantageous and Maryland still refused to go through with it, then ISI would "fight the hell" out of Maryland (Tr. 49).

On January 14, 1964, a formal proposal was submitted to the board of directors of Maryland by Wortham that the board recommend to its stockholders exchange of their shares in Maryland for shares of convertible preferred and common stock of American General (Tr. 49-50; Pl. Ex. 3). The proposal stated that it was "conditioned upon receipt of the approval of the transaction by all requisite governmental authorities." (Tr. 191; Pl. Ex. 3, p. 7). Subsequent to the receipt of the formal proposal, ISI initiated several telephone calls and letters to Maryland urging acceptance of the proposal (Tr. 52-53; Pl. Exs. 4, 5).

The formal proposal of January 14, 1964, was considered by the board of directors of Maryland and referred to a committee of four directors, none of whom were officers of the company, for analysis and consideration on the basis of available information and a study made by Maryland's financial advisers, the well-known New York investment banking firm of Merrill Lynch, Pierce, Fenner and Smith, Incorporated (Tr. 51, 157-158). The committee then met with a committee from American General on March 9 in Washington, D. C. (Tr. 51). Early in the meeting the Maryland committee proposed certain terms which it deemed to be essential if any further discussions were to be held, one term being that a separate holding company should be created to

acquire control of both companies and that any idea of the acquisition of Maryland by American General should be abandoned (Tr. 57-58, 162-163; Df. Ex. 3, p. 7). Maryland's proposals were not acceptable and the meeting thereafter terminated (Tr. 58); American General thereupon issued press releases saying it had called off the negotiations (Pl. Ex. 6). Maryland informed its stockholders of these developments on March 16, 1964 (Pl. Ex. 7).

Promptly thereafter, the board of directors of Maryland determined to proceed with Maryland's previously discussed plan to enter the life insurance field (Tr. 60). On April 7, 1964, the board adopted a resolution agreeing to subscribe to $2,500,000 worth of stock of Life Insurance Company of Maryland, Inc. (Pl. Ex. 8). A search was immediately instituted for experienced executive personnel to direct the life insurance operation and the interest of a number of suitable persons was obtained (Tr. 287).

At the request of First Boston Corporation, Miller agreed to meet once again with Woodson of American General, this time in New York on April 20, 1964 (Tr. 62). At this meeting Miller again stressed that any arrangement for affiliation of the two companies would have to involve a

newly created holding company and could not appear to be a take over of Maryland (Df. Ex. 3, p. 9).

On May 5 and May 14, 1964, ISI and certain other stockholders wrote letters to Miller demanding the right to inspect and copy the stock ledger of Maryland and stating that this demand was being made "in order to provide American General Insurance Company with the information necessary to make an offer direct to the holders of Maryland Stock to exchange shares of American General for their shares of Maryland" (Pl. Exs. 9, 10). Thereafter certain subsidiaries of American General and other stockholders of Maryland, including Pacific National Bank of San Francisco, as Trustee under the Amended Trust Agreement with ISI dated December 18, 1939, filed suit in the Superior Court of Baltimore City praying for a writ of mandamus directed to certain of Maryland's officers and its stock transfer agent to permit an agent and attorney for the petitioners to inspect and copy the stock ledger, reiterating that their purpose in doing so was as stated in the above-described letters (Tr. 64-65). This matter came on for hearing on demurrer to answer. After hearing argument, the court filed an opinion on July 29, 1964 overruling the demurrer on the ground that the prospectus contained in the registration statement was misleading (A. 14-15). The court commented that the proposed exchange offer appeared prima facie to be unfair to Maryland's stockholders (A.16). (Because this opinion has not been officially reported, a copy is attached hereto as an appendix for the convenience of the court.)

On May 20, 1964, American General filed a registration statement with the Securities and Exchange Commission proposing an exchange of American General stock for Maryland's stock or as much thereof as might be tendered pursuant to American General's offer (Tr. 65; Pl. Ex. 11-A). The filing

of this registration statement and its attendant publicity completely frustrated plaintiff's efforts to enter the life insurance business; the persons previously interested in positions as executives of Life Insurance Company of Maryland, Inc. have indicated that, in view of the situation with American General, they do not now wish to be considered (Tr. 113-14, 288-89).

By letter dated and mailed May 25, 1964, plaintiff advised its stockholders not to accept the proposed offer of exchange set forth in defendant American General's registration statement and stated that it was inadequate to safeguard the interests of the stockholders and that Maryland would oppose the offer by all legal means (Pl. Ex. 14). On June 10, 1964, Maryland notified its stockholders in some detail of the reasons why it felt the proposed exchange was not fair to the Maryland stockholders (Tr. 69; Pl. Ex. 13). From the time that the rumors of a possible affiliation between Maryland and American General had first been circulated in the latter part of December, 1963, many of Maryland's 17,000 agents had expressed concern (Tr. 292-93). The filing by American General on May 20, 1964, of its registration statement produced great agitation among the agents and in order to inform them as to the steps which Maryland was taking, a copy of the letter to the stockholders was sent to the Maryland agents on June 11, 1964 (Tr. 69, 124, 295-96; Pl. Ex. 13). Subsequent to these events, Maryland received a large volume of letters from agents who, in the aggregate, produced in 1963 a total premium volume in excess of $66,500,000 or 44% of the net premiums written by Maryland (Tr. 114; Pl. Ex. 20, p. 1). These agents expressed their opposition to and concern over the proposed acquisition and indicated that if stock control of

plaintiff by American General became effective, a substantial number of Maryland's agency relationships would be terminated and substantial accounts would be lost by Maryland (Tr. 114; Pl. Ex. 20).

Notwithstanding the continued opposition of Maryland's board of directors, American General, Wortham, Woodson and ISI have persisted in their intention to proceed with the exchange offer. To this end American General entered into an agreement with Lehman Brothers, a New York investment banking firm, to form and manage a group of security dealers to solicit tenders of plaintiff's common stock pursuant to the offer of exchange (Pl. Ex. 11-B, p. 1). Dealers throughout the country have been requested to act as soliciting dealers in this connection (Pl. Ex. 12). On June 5, 1964, the management of American General obtained from the stockholders of that company authorization to issue and to offer in exchange for 3,463,759 shares of the stock of Maryland 3,463,759 shares of $1.80 cumulative convertible preferred stock and 1,154,587 shares of common stock of American General (Tr. 67-68).

On June 30, 1964, Lehman Brothers, as dealer-manager, wrote to security dealers stating that its anticipation was that the registration statement relating to the proposed exchange offer would become effective on July 8, 1964 (Pl. Ex. 12). In this letter the dealer-manager stated that "We will, of course, notify you when this event occurs and at that time the Exchange Offer will commence." (Pl. Ex. 12). The present action was instituted in the district court on July 7, 1964.

At the trial it was proven by affidavits and by testimony given both by witnesses called by plaintiff and by a witness called by the defendants that it was the practice of agents who represented casualty companies

which were also engaged in the life insurance business to place all or a great part of their life insurance with the companies which accepted their casualty business (Tr. 80-82, 95, 109, 206, 220; Pl. Ex. 19). In recent years the casualty business has resulted in heavy underwriting losses for many companies and in order to be in a position to get companies to accept casualty business, the agents felt obligated to place their profitable life insurance business with the same companies (Tr. 55, 80-82, 95, 109, 206, 220; Pl. Ex. 19). Thus, the result of the take over of Maryland by American General would inevitably be the transfer to American General of the greater part of the life insurance written by Maryland's 17,000 agents which in 1962 was estimated to be upwards of $418,000,000 a year of insurance in force (Pl. Ex. 18, Ex. i, p. 6).

## STATUTES INVOLVED

The relevant statues involved are set forth in the Appendix.

## STATEMENT OF POINTS

1. The district court abused its discretion by finding that Maryland had failed to show irreparable injury and by failing to grant Maryland protection therefrom. The record clearly indicates that Maryland would be irreparably injured by the proposed exchange offer. Maryland would be injured by being unable to activate its own life insurance company, by having its agency relationships disturbed, and by losing business. The district court's finding was based upon a complete misinterpretation of the position of Maryland and of Maryland's agents, as to both of which the record is clear. The preliminary injunction which the district court did grant does not afford Maryland adequate protection.

2. The district court abused its discretion by failing to balance the equities. Judge McGarraghy looked only to the possible injury

to American General and to Maryland's stockholders in case the preliminary injunction should issue and it later be found that the exchange offer does not violate the antitrust laws, and ignored the irreparable injury which Maryland and the stockholders of both companies will suffer if the preliminary injunction does not issue and it is later found that the exchange offer does violate the antitrust laws.

3. The District Court abused its discretion by holding that Maryland had failed to make the necessary showing on the merits. Maryland was required to show that there was a probability that consummation of the proposed exchange offer would violate the antitrust laws. Maryland clearly met that requirement by showing that the appellees have probably violated Section 1 of the Sherman Act and Section 7 of the Clayton Act.

## SUMMARY OF ARGUMENT

The record in this case clearly shows that Maryland will suffer irreparable injury if the preliminary injunction prohibiting the exchange of stock proposed by American General does not issue. Maryland has already been effectively foreclosed from entering the life insurance field and will continue to be so as long as American General has the power at some future time to take control of Maryland. Moreover, if the exchange is allowed to proceed, Maryland will suffer irreparable damage to vital relationships which it has with its agents throughout the country; in fact, many of these relationships will be permanently destroyed and their replacement, as well as the replacement of those agencies terminated by normal attrition, will be seriously hampered as will the replacement of employees who will be lured away by competitors fishing in troubled waters. The apprehension

which the Maryland agents have regarding the proposed take over of Maryland by American General is causing and will continue to cause those agents to divert business away from Maryland.

From the time discussion of an affiliation between Maryland and American General first began, Maryland has realized that it would suffer irreparable injury if it should appear to be taken over by American General and for this reason it has continuously insisted that any affiliation of the two companies must not be accomplished by the acquisition of stock control of Maryland by American General. The district court's finding that Maryland contemplated entering into an arrangement with American General similar to the exchange offer now proposed was based on a complete misinterpretation of the record which was quite clear on this point.

Similarly, the district court's finding that unrest among Maryland's agents was caused by Maryland's resistence to the proposed exchange offer is directly contrary to the undisputed evidence. Maryland's resistence to the exchange offer was based on reasonable grounds and was the performance of a plain duty for which Maryland cannot be penalized. The unrest of the agents is based on the fear that Maryland will be taken over by American General, a fear that would have existed even if Maryland had not opposed the proposed exchange offer.

The preliminary injunction which was granted by the district court permits the exchange of stock to go forward, restricting only temporarily the exercise of full control of Maryland by American General. Inasmuch as the damage to Maryland results from uncertainty as to Maryland's future, these restrictions are wholly ineffective to protect Maryland and thus it was an abuse of discretion for the district court to refuse to enjoin

the proposed exchange on the ground that these temporary restrictions were inadequate to prevent irreparable injury.

The district court concerned itself only with the injury which might be inflicted upon American General and the stockholders of Maryland if the preliminary injunction should issue and it later be found that the exchange of stock did not violate the antitrust laws. The district court totally ignored the irreparable injury which Maryland and its agents and the stockholders of both companies will suffer should the preliminary injunction not issue and it later be found that the exchange offer does violate the antitrust laws. This failure to balance the equities amounted to a clear abuse of discretion.

In order to obtain a preliminary injunction, Maryland was required to prove that the proposed exchange of stock would probably violate the antitrust laws. Maryland met that burden by showing that the acquisition of control of Maryland by American General would result in the elimination of competition between two companies having combined assets of approximately three-quarter billion dollars and combined annual premium income of approximately one-quarter billion dollars for nearly one hundred million dollars in annual fire and casualty premiums and for nearly ten million dollars in annual sickness and accident premiums, and would result in the total exclusion of potential competition between the two companies in the life insurance field. Thus the acquisition of control of Maryland by American General would effect the elimination of significant competition between major competitors in a relevant market and thereby probably constitute a violation of Section 1 of the Sherman Act.

Maryland further showed that the acquisition of control of Maryland by American General would probably violate Section 7 of the Clayton Act since it would bring together competing businesses, as in the fire and casualty and the accident and sickness fields, would join a company engaged in the life insurance business with one about to engage in that business thereby eliminating potential competition and would secure for American General the greater part of the life insurance business now placed by Maryland's 17,000 agents in competing companies.

ARGUMENT

I

THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT MARYLAND FAILED TO SHOW IRREPARABLE INJURY

A. The Record Clearly Showed Irreparable Injury to Maryland.

Finding of Fact No. 30 proposed by the defendants reads as follows:

> "Plaintiff will not suffer any irreparable injury by reason of American General carrying out the proposed Offer of Exchange and thereafter holding any common stock of Maryland received through the exchange offer if pending a final determination of this action, American General is restrained from changing the management of Maryland, merging or consolidating Maryland with The American General Group or commingling the assets of Maryland with the assets of The American General Group and making any change in the policies, practices and personnel of Maryland Casualty Company."

Finding No. 35 of the findings of fact made by the district court is a Chinese copy of the finding proposed by the plaintiff.

It need hardly be pointed out that this finding impliedly admits the existence of irreparable injury to Maryland arising out of the proposed exchange offer, and indeed on this point the evidence is overwhelming. It may be summarized as follows:

(1). Life Insurance.

As a practical matter, Maryland is presently completely foreclosed from entering the life insurance field. Although Maryland has an existing life insurance subsidiary, Life Insurance Company of Maryland, Inc., it will be impossible for it to activate this subsidiary while it is threatened with a take over by American General.

Charles H. Peterson, Vice-President of Maryland in charge of agents, testified regarding his attempts to obtain suitable executive personnel to head the life insurance company for Maryland. As he pointed out, those prospects which he had and which he considered worthwhile, told him plainly that they did not wish to be considered further so long as the threat of a take over by American General existed (Tr. 288-89). This is entirely obvious inasmuch as no person of executive caliber would relinquish his present position in order to take a position as head of the Life Insurance Company of Maryland, Inc., when the future existence of that position, in fact of the company itself, was hanging in the balance.

(2). Agency Relationships.

The working relationship between an insurance company and its agents is necessarily one of trust and confidence based upon the experience of each with the other in knowing and being able to predict the desires, expectations and requirements of the other (Tr. 88, 291). Once this close relationship is broken and the agent leaves the company, it is practically impossible for the company to get him back (Tr. 292, 301).

The threat of a take over of Maryland by American General created widespread unrest among Maryland's agents who are extremely apprehensive about their future and the future of Maryland (Tr. 97, 110). This unrest and apprehension has manifest itself in the large volume of letters which Maryland has received from its agents (Pl. Ex. 20). As a result of the uncertainty and the apprehension about the future of Maryland created by the threatened acquisition by American General, Maryland's customers and agents have become vulnerable to attack by competitors who are able to offer a more stable picture of future security. Approaches by competitors which

take advantage of uncertain situations such as the present are common in the insurance industry; they inevitably lead to the diversion of business and the severing of agency relationships (Tr. 79, 115-16, 294).

In addition, the uncertainty and apprehension overhanging Maryland at the present time make Maryland subject to raids on its most capable personnel, both key executives and lower echelon, by other companies who can offer future security. Maryland is thus stripped of the caliber of persons it requires to remain a top insurance company (Tr. 116-17).

Maryland is incurring further injuries as a result of the threatened acquisition in that it is unable to obtain its requisite number of new agency appointments to fill the vacancies created by the natural turn-over of agents (Tr. 114-15, 297-98).

(3). Loss of Business.

The natural effect of the unrest and apprehension on the part of the agents is for them to decrease their activity on behalf of Maryland and divert business from Maryland until such time as they decide whether to continue representing Maryland (Tr. 77-79, 87, 97-98). This situation is well illustrated by the testimony of Mr. Clifton Whyburn, president of a managing general agency in El Paso, Texas, which is a general agent for several insurance companies and manages over 300 individual agents. In commenting upon the effect of the proposed exchange offer by American General, Mr. Whyburn testified:

> "A Well, the Maryland underwriting practices have been such that they have furnished very excellent facilities for agents, and they have built a reputation with them, and I think they would be apprehensive about a change, some change that might take place with respect to the underwriting policies, acceptability business, the handling of it.

> "Q What would be the result of this apprehensiveness that you say would affect it?
>
> "A I am afraid that business would be diverted to other companies represented by the agencies." (Tr. 110).

Since the start of the widespread unrest created by the threatened acquisition by American General, the number of items of new business written by Maryland agents for the first half of 1964 is approximately 15% less than in the same period of the year before (Tr. 297). Maryland is further in danger of suffering a loss of accounts by customers who will not wish to continue having their risks placed with Maryland after it becomes a company which was acquired by American General (Tr. 298-99). In addition, Maryland is in danger of losing a substantial number of its larger and more productive agents whose volume of business places them in a position to be extremely selective in the companies in which they will place their business (Tr. 300-01).

B. The District Court Misinterpreted the Position of Maryland and of Maryland's Agents.

On page 2 of the memorandum filed by the district court, the following appears:

> "THIRD, on the issue of irreparable injury, the principal officers of the plaintiff who engaged in negotiations with representatives of the defendant looking to a stock acquisition such as is now contemplated, were entirely willing to agree to such a proposed transfer provided the terms were acceptable to them. It seems unlikely to me that these officers would have participated in such negotiations and, indeed, made their own proposals of terms if, in fact, the stock acquisition by defendants would cause the damage to plaintiff such as the officers now say would result;"

It is apparent that Judge McGarraghy wholly failed to understand the position taken by Maryland throughout this controversy. The testimony

of Maryland's president and the affidavit of the vice-president of America General (Df. Ex. 3) (who was also president of American General's life insurance subsidiaries) are completely consistent on this point. Both of them clearly state that at all times Maryland opposed any type of affiliation which would be or would appear to be a take over of Maryland by American General.

At the first meeting held between Woodson on behalf of American General and Miller and others on behalf of Maryland in November 1963, this was made perfectly clear. The type of affiliation discussed is distinctly stated by Woodson, Vice-President of American General: "These discussions contemplated the creation of a new insurance company (suggested title "Maryland General Insurance Company") into which both Maryland and American General would be merged." (Df. Ex. 3, p. 2). Miller's testimony is in accord with this (Tr. 42, 144).

The next meeting between Maryland and American General regarding discussions of affiliation occurred on December 5 and 6, 1963, in Houston, Texas. The pertinent part of the discussions at that meeting is again distinctly stated in Woodson's affidavit:

> "Mr. Glibert [Executive Vice-President of Maryland] made the suggestion at this meeting that instead of creating a new insurance corporation consideration be given to creating a holding company, which would acquire all (or as nearly 100% as possible) of the stock of Maryland and American General, and it appeared that all parties were in agreement that this would be the best vehicle for the purpose since it would permit both Maryland Casualty and American General to continue their respective present identities, present management, present directors and present methods of operation, subject to policy direction by the holding company, and would permit a gradual merger over a period of time should that prove desirable." (Df. Ex. 3, p. 3).

Miller's testimony regarding the nature of the discussions at that meeting is again in substantial agreement with Mr. Woodson's (Tr. 151-52).

Subsequent to the formal proposal of American General submitted on January 14, 1964, to Maryland which proposed a take over of Maryland by American General, the parties met for further discussion on March 9, 1964, in Washington, D. C. Again Maryland emphasized its position on the question of the type of affiliation which would be considered. Maryland stated its position by offering a counter proposal for discussion. One of the items of this counter proposal, as stated by Woodson, was that:

> "A new Maryland corporation would be formed with its headquarters at Baltimore, with Mr. Worthan as Chairman of the Board, Mr. Miller as President and Chief Executive Officer, Mr. Harper as Vice Chairman of the Board and Mr. Glibert and Mr. Woodson as Executive Vice Presidents." (Df. Ex. 3, P. 7).

Miller's recollection on the essence of this discussion is substantially the same as that of Woodson (Tr. 58).

On April 20, 1964, Woodson and Miller met in New York to discuss further the proposed offer of exchange. Woodson's affidavit is most explicit on the point of Maryland's insistence that there not be a take over of Maryland.

> "Mr. Miller outlined the three conditions on which he said Maryland was firmly committed, namely, (a) that any affiliation between American General and Maryland must be handled so it does not appear to be a 'take over of Maryland', (b) the only arrangement Maryland is prepared to discuss must involve a newly created holding company . . . . e.g. they will not take American General shares, even with the changed name . . . . and this cannot be a Texas company and (c) that Miller must be Chief Executive Officer. Miller also stated that while there was not yet an agreement on the 'arithmetic' of the exchange, it would be fruitless to discuss this if an agreement could not be reached on the first three items." (Df. Ex. 3, p. 9) (Original emission and emphasis).

These undisputed excerpts from the affidavit of American General's Vice President establish incontrovertibly the fact that Maryland was at all times inexorably opposed to any type of affiliation which would be in the nature of a take over of Maryland by American General. When the essential nature of the American General proposal (a take over of Maryland by American General) is compared with the clear showing that Maryland has always opposed such an arrangement, it becomes obvious that there is no foundation for a finding that the officers of Maryland were "entirely willing to agree to such a proposed transfer". It is equally obvious that the district court erred in making this finding and in using it as a basis for, in effect, rejecting Maryland's proof that it would be irrevocably injured pending trial on the merits if the preliminary injunction is not granted. To make such use of a finding so in opposition to the record amounts to an abuse of discretion on the part of the district court.

Equally arbitrary was the fourth reason assigned in the district court's memorandum for its refusal to grant the preliminary injunction. That reason was as follows:

> "FOURTH, also on the issue of irreparable injury, while the plaintiff introduced evidence which it contends establishes a threatened disturbance in its relations with its agents throughout the country, much of this evidence is the result of activities by plaintiff following the breakdown of negotiations when the plaintiff by communications to its stockholders and agents undertook an active campaign of resistance against the proposed stock acquisition by the defendants."

It is true that the board of directors and officers of the plaintiff "undertook an active campaign of resistance against the proposed stock acquisition by the defendants." Their reasons for doing so were stated at some length in the letter of Miller to the stockholders on June 10, 1964

(Pl. Ex. 13). First and foremost was the fact that the proposed exchange offer amounted to a take over of Maryland by American General. The purpose of the exchange offer was for American General to acquire a controlling interest in the stock of Maryland, thereby acquiring the power to select Maryland's directors and officers and to dictate its policies. While the prospectus contains some guarded language stating American General's present intention to continue the existing management and policies of Maryland, its power to effectuate any desired changes in the management and policies should the exchange offer be successful is not disputed.

The board of directors and management of Maryland believed that any affiliation of this character would deeply disturb long established agency relationships and would result in a serious loss of business to Maryland. The record amply demonstrates the reasonableness of that belief. The reaction of an agent of a casualty company which has been acquired by a life insurance company is amply described by Charles H. Jones, former president of the National Association of Insurance Agents. Among other things, he said:

> "You get going with a company, you know what their practices are; you know what they want you to do as their agent, how they will treat your clients. And when they are acquired you have no way of knowing. They have a new boss and this filters down from the top.
>
> I would say as far as my opinion of the general feeling that I have run into throughout the country, that this certainly prevailed in any knowledgeable agency." (Tr. 77).
>
> * * * *
>
> "So that I think that it has an immediate bearing as to what is even rumors in our business among some people are important. Furthermore, after it gets a

> little farther along, unfortunately there is a lot of competition in our business, so then the competitors start coming in and telling my agency or telling other agencies, well -- back to the Springfield deal -- well, Springfield is going the life insurance route, which is a saying in our business, and you better watch out, you better give us their business...." (Tr. 79).

Mr. Glover, also a past President of the National Association of Insurance Agents, stated (Tr. 97):

> "When it becomes generally known among the entire agency plant -- most of them during these last few years have been through -- heard about other merger operations, and I think that agents generally are rather fearful of the merger situation on an overall basis. It is sort of like fear of the unknown. There are some that worked and some that did not work, and the ones that did not work have been rather bad on the agency plant."

Through branch offices and field personnel Maryland had become acutely aware that this type of apprehension and fear had started to overtake the Maryland agents as soon as the rumors of a possible take over of Maryland by American General had begun to circulate (Tr. 292-93). Maryland's management and board of directors realized that this type of disturbance of its agency relationships could well destroy the effectiveness of the carefully nurtured agency plant and could deal a serious blow to Maryland's entire business. For this reason Maryland, throughout its discussions, had insisted that there should be no acquisition of Maryland stock by American General and this was a major reason for their opposition to the exchange offer proposed in the registration statement filed on May 20, 1964. (Pl. Ex. 13, p. 3).

An additional and equally strong reason why the directors and officers of Maryland objected to the proposed exchange offer was its inherent

unfairness to Maryland's stockholders. The board's conclusion that the offer was unfair to Maryland's stockholders was based on its own analysis and on a report furnished by its financial advisers, Merrill, Lynch, Pierce, Fenner & Smith, Incorporated (Pl. Ex. 13), and considered a number of factors, including particularly the relative strength of the two companies as compared with the contribution which each would make to the proposed affiliation. We believe that an examination of plaintiff's Exhibit 13 will convince the court that these objections were substantial. Indeed, Judge Barnes, in overruling the demurrer to the answer in the mandamus proceeding in the Superior Court of Baltimore City, commented on the fact that a "strong showing" had been made "prima facie, of an inequitable and inadequate offer * * * so far as Maryland Casualty and its stockholders are concerned..." (A-16).

In view of these strong objections to the proposal, it was the plain duty of the directors and officers of Maryland to inform the stockholders of their views and to take all legitimate steps to oppose the plan. The district court now attempts to penalize Maryland for performing this duty by refusing to recognize the disturbances in the agency relationships on the ground that much of the disturbance "is the result of activities by the plaintiff following the breakdown of negotiations when the plaintiff by communications to its stockholders and agents undertook an active campaign of resistance against the proposed stock acquisition by the defendants." For the court to so penalize Maryland for the performance of a plain duty is grossly unjust, so unjust as to amount to an abuse of discretion.

Moreover, it is apparent that the district court has once again misunderstood the testimony. The agents were not disturbed by the opposition

of Maryland to the plan. What disturbed them, as the record makes amply clear, was the threatened take over of Maryland by American General. This disturbance would have existed without regard to whether Maryland opposed the take over. Indeed, the opposition of Maryland to the proposed exchange may well have had the result of reassuring the agents. The witness Peterson pointed this out by saying that he was most anxious that the agents should know of the action taken by the board of directors to oppose the plan since "I felt it would give our branch managers an opportunity to help settle down these agents and, incidentally, also a chance to help settle down our branch office employees who had become very restless." (Tr. 296).

C. The Preliminary Injunction Granted by the District Court is Inadequate to Protect Maryland.

In the light of the clear proof of irreparable injury to Maryland, the only question is whether the district court was justified in concluding that the temporary restrictions which it placed on the exercise by American General of control over the management of Maryland would be sufficient to protect Maryland. We submit that the district court's finding in this respect was so plainly wrong as to amount to an abuse of discretion.

Plainly, the court's order did not in any way alter the fact that Maryland is presently precluded from going forward with the development of the business of the Life Insurance Company of Maryland, Inc. The preliminary injunction against defendant's using or voting any stock of Maryland "to prevent or to interfere with Maryland Casualty Company entering into the life insurance business" (P.I. ¶ 4) is wholly ineffectual. As the uncontradicted testimony amply shows, Maryland is helpless to enter the life insurance business so long as the threat of control by American General

continues, since no qualified persons can be found to furnish the necessary executive leadership under such circumstances (Tr. 306). The provisions of paragraph 4 of the preliminary injunction are temporary and are not effective after the final determination of the suit. No properly qualified person would accept employment for so limited and uncertain a period. It goes without saying that if American General ultimately takes over Maryland, competition between the two companies in the field of life insurance would end. As a matter of fact, the prospectus which is contained within the registration statement makes it abundantly clear that it is the purpose of American General to use the Maryland's agents to sell American General's life insurance (Pl. Ex. 11-A, p. 3).

Likewise, the effect on agency relationships and the threatened loss of business by Maryland is not cured by temporary restrictions such as are embodied in the other paragraphs of the preliminary injunction issued by the district court. This is made perfectly plain by the testimony of the witnesses Jones and Glover, both of whom are uniquely qualified through their experience as past presidents of the National Association of Insurance Agents to testify as to the effect upon agents of the proposed exchange offer (Tr. 77-79, 97). The testimony of the witnesses Miller and Peterson is to the same effect (Tr. 117-18, 320). As Mr. Peterson put it, "We have got the ax over our head." (Tr. 320).

## II

## THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO BALANCE THE EQUITIES

The fifth, sixth and seventh reasons given by the district court for refusing to grant the preliminary injunction were based on the supposed

irreparable loss to the defendants and to the stockholders of the plaintiff which would result in the event that a preliminary injunction should issue. In that connection the court pointed out that the issuance of a preliminary injunction would amount to a final determination on the merits for the plaintiff. This holding totally ignores the fact that by denying a preliminary injunction prohibiting the exchange of stock, the court has, in effect, determined the merits of the case against Maryland. As has been previously shown, only by such a prohibition can Maryland be protected against irreparable injury.

It thus becomes obvious that a decision either way on the issuance of a preliminary injunction against the proposed exchange of stock may have the effect of a determination on the merits against one party or the other: against American General if the injunction is granted; against Maryland if the injunction is denied. This being the case, the equities in favor of each side on this particular point must be balanced to determine whether the issuance of a preliminary injunction is justified. The district court failed to do this and its failure amounted to an abuse of discretion.

This court, in Perry v. Perry, 88 App. D.C. 337, 190 F.2d 601, 602 (1951), had before it the district court's denial of motion for a preliminary injunction. Judge Bazelon speaking for the court, said, at 603-604:

> "Against this injury to appellant must be measured the injury to appellee from deferring her suit against appellant's present wife until the meaning and effect of the non-molestation agreement can be finally determined. It seems to us that the balance of injury and convenience on this point, too, is with the appellant. The fact that issuance of a preliminary injunction cannot remove the harm already done by appellee's independent suit is no basis for denying relief against aggravation of such harm in the future. The granting of preliminary relief will tend to minimize any future harm until this suit is decided on the merits."

In Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 (2d Cir. 1953), the court said:

> "The judge must consider whether irreparable harm is likely to result to plaintiff if pendente lite (i.e., "immediately") the injunction is denied, and against this harm he must balance the harm to defendant likely to result if the relief is granted."

See to the same effect, Crane Co. v. Briggs Mfg. Co., 280 F.2d 747, 749-750 (6th Cir. 1960).

In Muskegon Piston Ring Co. v. Gulf & Western Industries, Inc., 328 F.2d 830 (6th Cir. 1964) the court sustained a finding of the district judge, which granted a preliminary injunction "to prevent irreparable injury to the plaintiffs which plainly outweighs any foreseeable harm to Gulf & Western".

Neither in his findings of fact or conclusions of law or in the accompanying memorandum did the district judge undertake to balance the equities. Had he done so, we submit that he would have been compelled to reach the same conclusion as the district judge in the Muskegon case. We concede that there was evidence in the record from which the court might have found that stockholders who purchased their shares in Maryland prior to December, 1963, might be in a position to realize a capital gain were the exchange offer permitted to proceed. We also concede that stockholders who purchased their stock in Maryland subsequent to December, 1963, might on the basis of evidence in the record suffer a capital loss if the exchange offer is not permitted to proceed.

As against this there is, however, the certain fact that if the exchange offer is permitted to proceed and subsequently found to have been

a violation of the antitrust laws, the stockholders in Maryland who exchange their stock for stock of American General will suffer substantial losses as the result of being locked into stock of American General which will be a relatively small life insurance company without the advantages of affiliation of Maryland and burdened with the court imposed obligation to divest itself of a large block of Maryland stock.

As was shown by the affidavit of Winthrop C. Lenz, Senior Vice-President of the investment banking firm of Merrill, Lynch, Pierce, Fenner & Smith, who has for many years been in charge of their underwriting department, the uncertainties caused by such a large block of stock overhanging the market in the event of a gradual divesture or the flooding of the market in the event of a sudden divesture would act to depress the market price of Maryland stock, resulting in American General's being forced to sell Maryland stock at a price below that paid through the exchange offer. The loss resulting from such a forced divesture would fall on the stockholders of American General, including those who became such by virtue of the exchange offering (Pl. Ex. 26).

The present Maryland stockholders who do not exchange their stock under the proposal from American General would also be injured by a subsequent court order directing American General to divest itself of Maryland stock. The depression of the market referred to above would result in a reduction in the price of the stock held by each Maryland stockholder, thus forcing such stockholders to sell at a lower price or to consider holding their stock for an undetermined time, in the hope that the price would eventually recover to the previous level (Pl. Ex. 26).

It is thus apparent that any losses suffered by the stockholders of Maryland as the result of the issuance of the preliminary injunction would be more than balanced out by the losses which would be suffered by Maryland's stockholders, and those of American General as well, if the proposed exchange offer is permitted to proceed and the transaction is subsequently found to be a violation of the antitrust laws.

The only injury which the defendants could suffer by reason of the granting of the preliminary injunction would be the frustration of the merger with the loss of the expenses already undertaken to put it through. These expenses were undertaken advisedly with full consciousness of the determined opposition of Maryland. They should not weigh heavily in the balance as compared with the overwhelming testimony as to the grave and irreparable injury which Maryland's business will suffer if the proposed exchange offer is permitted to proceed. In this connection the court's attention is respectfully called to the affidavit of Alanson R. Fredericks (Pl. Ex. 20) which shows that Maryland agents producing approximately $66,500,000 of premiums annually have written to the Maryland indicating their strong discontent with the take over of Maryland by American General and their apprehension that such a take over would result in extensive loss of business to the Maryland. As is pointed out in paragraph 7 of that affidavit, letters which have been received indicate that agents who produced $3,213,858 in premiums written in 1963 have indicated that they <u>will</u> terminate their agency relationships if control of Maryland by American General becomes effective. Other agents representing $7,577,645 of premiums written in 1963 indicated that they would give serious consideration to terminating their agency relationships.

III

THE DISTRICT COURT ABUSED ITS DISCRETION BY HOLDING THAT APPELLANT HAD FAILED TO MAKE THE NECESSARY SHOWING ON THE MERITS

A. The Nature of Appellant's Burden

In affirming the granting of a preliminary injunction to restrain a plumbing supply manufacturer from electing two members of the board of directors of a competitor of whose stock it had acquired 22%, the Court of Appeals for the Sixth Circuit stated that the "Primary question" was "whether there is a reasonable probability that Briggs may prevail on the merits in the principal action, which is a predicate to the granting of an injunction pendente lite." Crane Co. v. Briggs Mfg. Co., 280 F.2d 747, 749 (6th Cir. 1960).

The role in preliminary injunctions of the strength of the merits of the principal action was made more explicit by the earlier case of Hamilton Watch Co. v. ~~Gulf & Western Industries, Inc.~~ BENRUS WATCH CO., 206 F.2d 738 (2d Cir. 1953). In rejecting the contention of the defendant that it appeared unmistakably that the defendant had not violated Section 7 of the Clayton Act, the court recognized that the trial Judge's findings at the preliminary hearing might later be altered; however, such findings were supported by the evidence and thus were binding on appeal. The court felt that these findings indicated that the court at a final hearing might find a Section 7 violation. The court stated, at 740:

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance

> of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."

See also Muskegon Piston Ring Co. v. Gulf & Western Industries, Inc., 328 F.2d 830 (6th Cir. 1964), an antitrust case similar to the present in which the district court granted a preliminary injunction.

In Perry v. Perry, 88 App. D.C. 337, 190 F.2d 601, 602 (D.C. Cir. 1951), this court noted that one of the intangible factors to be considered by a court when passing upon a motion for preliminary injunction is "the probability of the ultimate success or failure of the suit".

B. The Exchange Offer Probably Violates Section 1 of the Sherman Act.

Insofar as presently pertinent, § 1 of the Sherman Act, 15 U.S.C.A. § 1, provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal * * *.

The complaint here charges, in substance, that the American General Group has violated the Sherman Act by combining and conspiring among themselves and with others to prevent Maryland from competing with the American General Group in the sale and writing of insurance in interstate commerce. Complaint, Par. 10. The conspiracy, it was alleged, was to be effectuated by American General's acquisition of a controlling stock interest in Maryland. Id., Pars. 11-14. Although the American General Group has, of course, denied any violation of law, it has not denied the

existence and purpose of the combination and conspiracy referred to, and it has not denied that the effect of the Group's acquisition of control of Maryland will be to prevent Maryland from entering the life insurance business and to eliminate entirely the competition now existing between Maryland and the American General Group in other lines of insurance.

With respect to life insurance, the combination and conspiracy in question have indeed already had the effect of preventing Maryland from entering that field. There is, therefore, no certain yardstick by which to measure the extent to which competition between Maryland and American General in the life insurance business has been suppressed. It is obvious, however, that the competition thus prevented is potentially substantial. For a large number of Maryland's more than 17,000 agents are engaged in writing life insurance, and their annual volume exceeds $418,000,000 of life insurance in force. Since the expectation of receiving a substantial share of that business is one of American General's reasons for wishing to acquire Maryland (see Pl. Ex. 11-A, pp. 3, 33), it must be assumed that Maryland itself would receive an equal or larger share if it could throw off the restraint imposed by the American General conspiracy.

In addition to this, it cannot be denied that the American General conspiracy involves a substantial aggregation of capital, as shown by the following 1963 figures derived from page 14, 32 and 42 of American General's July 6, 1964, Prospectus filed with the Securities and Exchange Commission (Pl. Ex. 11-A):

| | Admitted Assets | Total Premiums |
|---|---|---|
| American Group | $381,899,322 | $ 87,642,467 |
| Maryland | 392,840,578 | 195,797,669 |
| Total | $774,739,900 | $283,440,136 |

Of even more importance, however, is the business for which American General and Maryland were engaged in direct competition with each other. In 1963 the companies competed in the writing of fire and casualty insurance in 16 states and the District of Columbia, and in the writing of accident and sickness insurance in 42 states and the District of Columbia (Pl. Ex. 11-A, p. 14; Pl. Ex. 21). The competitive premiums written by the companies were as follows:

| | Fire and Casualty | Accident & Sickness | Total |
|---|---|---|---|
| American Group | $29,669,223 | $6,177,000 | $ 35,846,223 |
| Maryland | 69,576,607 | 3,132,685 | 72,709,292 |
| Total | $99,245,830 | $9,309,685 | $108,555,515 |

It seems to us that two concerns having combined assets in excess of three-fourths of a billion dollars, earning combined premium income in excess of one-fourth of a billion, and competing directly with each other for $108,555,515 of such income must surely be regarded as major competitive factors engaged in significant competition with each other. That being true, American General's combination and conspiracy to acquire Maryland runs afoul of the rule recently reannounced and applied in United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 (1964), that where "merging companies are major competitive factors in a relevant

market,[1/] the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act." 376 U.S. at 672-673.

Counsel for American General contend, however, that the Lexington Bank case is distinguishable and not in point because the merger there held unlawful under § 1 involved the largest and fourth largest banks in the relevant area -- Fayette County, Kentucky -- the shares of market held by the merged bank ranged upward of 52%, the bank established by the merger was larger than all the remaining banks combined, and the merger reduced to four the number of competing banks serving the affected area. Here, opposing counsel state, no comparable market structure exists -- a fact which we readily acknowledge. But it does not follow that the Lexington Bank case is inapplicable. For as we read the decision, in referring to the figures on which American General relies the Court was simply reciting the facts of the case with which it was dealing; the Court did not intimate that the rule which it laid down was applicable only in cases involving figures on the same order of magnitude.

On the contrary, the Court made it quite clear, we submit, that in merger cases the governing criterion in determining the applicability of § 1 of the Sherman Act is simply whether the merger eliminates significant or substantial competition. Thus, the Court stated that the Lexington Bank case was "governed by Northern Securities Co. v. United States, 193 U.S. 197 [1904], and its progeny" (376 U.S. at 670), and it summarized the

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1/ Apart from life insurance -- a field from which Maryland has been excluded by American General's acquisition conspiracy and campaign -- there are three relevant product markets involved in the Sherman Act aspect of the case at bar, namely, the sale of fire and casualty insurance, the sale of accident and health insurance, and the sale of both fire and casualty insurance and accident and health insurance. The relevant geographical markets are all of the states in which American General and Maryland compete with each other, each of such states, and each commercially significant area of each such state.

ruling in Northern Securities as follows:

> The Northern Pacific and the Great Northern operated parallel lines west of Chicago. A holding company acquired the controlling stock in each company. A violation of § 1 was adjudged without reference to or a determination of the extent to which the traffic of the combined roads was still subject to some competition. It was enough that the two roads competed, that their competition was not insubstantial, and that the combination put an end to it. [376 U.S. at 670.]

The Court also cited and relied on United States v. Union Pacific R. R., 226 U.S. 61 (1912), as being "in the same tradition." 376 U.S. at 670. It said that:

> As in the Northern Securities case the Court [in Union Pacific] held the combination illegal because of the elimination of the inter se competition between the merging companies, without reference to the strength or weakness of whatever competition remained. [376 U.S. at 670.]

The Court then quoted with approval the following highly significant language from the Union Pacific case:

> It is urged that this competitive traffic was infinitesimal when compared with the gross amount of business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think that the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected. [376 U.S. at 670-671; 226 U.S. at 88-89.]

Citing two additional "railroad cases,"[2] the Court thus summarized its Lexington Bank holding:

> Where, as here, the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act. [376 U.S. at 672-673.]

The Lexington Bank case therefore does not require an inquiry into market structure or a showing of comparative market positions or shares of market.[3] The rule of the case is simple, uncomplicated and direct -- irrespective of the strength of the competition which survives, a merger which eliminates substantial or significant competition between major competitors violates § 1 of the Sherman Act. And such is the effect of the merger into which American General here seeks to force Maryland.

For both American General, with group assets of $381,899,322 and premium income of $87,642,467, and Maryland, with assets of $392,840,578

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2/ The cases, cited at 376 U.S. 671, are United States v. Reading Co., 253 U.S. 26, 59 (1920), and United States v. Southern Pacific Co., 259 U.S. 214, 230-231 (1922).

3/ An analogy exists in the rule that a combination in restraint of trade "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 213 (1959); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961).

and premium income of $195,797,669, are clearly major competitive factors in competing directly with each other for $99,245,830 of fire and casualty premiums and $9,309,685 of accident and sickness premiums. This competition is both significant and substantial,[4/] and its elimination by merger would violate § 1 of the Sherman Act. That being true, the American General combination and conspiracy to eliminate such competition by acquiring Maryland is also in violation of § 1 of the Act and should be enjoined.

C. The Exchange Offer Probably Violates Section 7 of the Clayton Act.

Sec. 7 of the Clayton Act, as amended, 15 U.S.C. § 18, provides in pertinent part that no corporation engaged in interstate commerce shall acquire "the whole or any part" of the stock of any other corporation also engaged in interstate commerce "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition."

A threshold question in every § 7 case is the line of commerce and section of the country -- or the relevant product and geographical market -- involved in the proceeding. Here, the relevant markets include those previously identified as pertinent to the Sherman Act aspect of the case. Supra, n. 1, p.35. However, since § 7 has recently and specifically been held applicable to potential competition, and since American General's acquisition of part of Maryland's stock and its proposal to acquire the

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4/ In outlawing certain tying contracts as violative of both § 1 of the Sherman Act and § 3 of the Clayton Act, the Supreme Court held in International Salt Co. v. United States, 332 U.S. 392 (1947), that $500,000 -- the volume of business affected by the contracts -- "cannot be said to be insignificant or unsubstantial." 332 U.S. at 395, 396.

remainder have prevented Maryland from entering the life insurance field, life insurance in and throughout the 50 states of the Union and the District of Columbia -- in all of which Maryland is licensed to operate -- is an additional relevant market insofar as § 7 is concerned.5/

An additional fact to which it may be helpful to advert at the outset is that § 7 applies to acquisitions of all types -- horizontal, vertical and conglomerate, and American General's proposed acquisition of Maryland is of all three types. The acquisition is horizontal insofar as it would bring together competing businesses, as in the fire and casualty and the accident and sickness fields. It is vertical (forward vertical, to be more precise) insofar as it would secure for American General the agents -- either branch offices and their personnel or independent entrepreneurs -- through which Maryland distributes and sells insurance. The proposed acquisition is conglomerate insofar as it would join a company engaged in the life insurance business with one not so engaged. In each of these three aspects the acquisition is anticompetitive and violative of § 7.

As the Supreme Court held in Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962), the legislative history of § 7 "provides no unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers." No "definite quantitative or qualitative tests" were prescribed for determining whether a given merger or acquisition might

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5/ As we have previously indicated, life insurance is also a relevant market in relation to American General's violation of § 1 of the Sherman Act, but it has not been necessary to stress the point at this preliminary stage of the proceeding. We mention this so that counsel for American General will not be misled into regarding the point as waived.

substantially lessen competition. 370 U.S. at 321. But it is clear that the standard laid down did not require proof of a present injury to competition; the purpose of § 7 was to prevent injury by prescribing mergers which would probably substantially lessen competition in the future. 370 U.S. at 323, 332; United States v. Penn-Olin Chemical Co., 32 U.S. Law Week 4707, 4710, 4712 (June 22, 1964).

To this end, § 7 was designed to halt the "rising tide of economic concentration" by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." Brown Shoe Co. v. United States, supra, 370 U.S. at 317-318, 344-346; United States v. Continental Can Co., 32 U.S. Law Week 4642, 4648 (June 22, 1964). And a substantial lessening of competition may also be perceived when the "whole or material part of the competitive activity of an enterprise, which had been a substantial factor in competition, [has] been eliminated," or when a merger may result in the establishment of relationships which deprive rivals of a fair opportunity to compete.6/ The merger here proposed is unlawful by each of these standards.

As shown by the affidavit of Prof. Trosper, there has been a decided and accelerating merger trend in the insurance business in recent years. There were 187 such mergers during the five year period 1953-1957 and more than 450 during the five years 1958-1962. P. 3 of Ex. I to Pl. Ex. 18. Reports for 1963 and 1964 are not yet available, but little, if any, diminution in the rate of insurance mergers has been observed, and, as stated by Prof. Trosper:

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6/ Brown Shoe Co. v. United States, supra, 370 U.S. at 321, n. 36. See also United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 603 (S.D. N.Y. 1958).

> [T]he large number and the increasing trend of mergers between seasoned companies of substantial size is a movement which should certainly be examined very closely by supervisory officials. This concentration of assets and power should not be ignored. (P. 3. of Ex. I to Pl. Ex. 18.)

American General has participated in this merger trend, having acquired the ownership of six insurance companies, and substantial interests in two others, during the period 1954-1963. It is now negotiating for the acquisition of still another company, in addition to attempting to take over Maryland (Pl. Ex. 11-A, pp. 25-27).

In these circumstances, we submit that the facts here call for the Court to give effect to Congress' expressed "disapproval of successive acquisitions," and its purpose, in enacting § 7, "to prevent even small mergers that added to concentration in an industry," Brown Shoe Co. v. United States, supra, 370 U.S. at 345, n. 72, "to prevent accretions of power which are 'individually so minute as to make it difficult to use the Sherman Act test against them.'" United States v. Aluminum Co., 32 U.S. Law Week 4446, 4449 (June 1, 1964). For "tendencies toward concentration in industry are to be curbed in their incipiency," particularly where, as in the case at bar, the industry has a "history of tendency toward concentration," and the proposed acquisition is of a concern engaged in business on a national scale. Brown Shoe Co. v. United States, supra, 370 U.S. at 317-318, 345-346.

A second respect in which American General's proposed acquisition of Maryland would violate § 7 is that in terminating Maryland's existence and operation as a separate and independent concern, the acquisition would eliminate "the competitive activity of an enterprise which had been a substantial factor in competition." Brown Shoe Co. v. United States, supra,

370 U.S. at 321, n. 36. Surely there can be no question about this. For a company having assets of approximately $392,000,000, an annual premium income of approximately $196,000,000, and more than 17,000 agents in the 50 states of the Union and the District of Columbia must certainly be regarded as a "substantial factor in competition," and its elimination as such a factor will inevitably result in a substantial lessening of competition.

This is true not only nationally, but in a number of individual states, each of which -- and every significant area of which -- is, of course, a "section of the country" within the meaning of § 7. United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 (1964); United States v. Philadelphia National Bank, 374 U.S. 321, 357-362 (1963); Brown Shoe Company v. United States, supra, 370 U.S. at 336-339. A substantial lessening of competition is particularly evident in Texas, for example, from which American General derives $16,159,527 -- or more than half -- of its fire and casualty income, but in which Maryland does even more fire and casualty business than does American General. Pl. Ex. 11-A, p. 14. This has led Prof. Trosper to suggest that a desire "to ward off future competition" with Maryland "appears to be one motive of American General" in insisting upon trying to take Maryland over. P. 5 of Ex. I to Pl. Ex. 18. The existence of such a motive greatly strengthens our case. Brown Shoe Company v. United States, supra, 370 U.S. at 329, n. 48; United States v. Paramount Pictures, 334 U.S. 131, 174 (1948).

A third standard by which American General's proposed acquisition of Maryland must be judged illegal is the relationship which the acquisition would establish between American General and Maryland's more than 17,000

agents, and the effect of that relationship upon such agents and upon American General's competitors. Brown Shoe Co. v. United States, supra, 370 U.S. at 321, n. 36. As we have previously shown with respect to life insurance, the acquisition would substantially and adversely affect both the agents and the companies which they represent, in that the agents would no longer be free to place their life insurance business with the companies of their choice; they would, as a practical matter, feel compelled to place all or much the greater part of their life insurance with American General, to the detriment of American General's life insurance competitors. (Supra, p.10).

The agents' freedom of choice in respect of other lines of insurance would also be restricted, with consequent prejudice to companies competing with American General in those lines. As Prof. Trosper has stated in his affidavit:

> "The inevitable consequence of this merger is that the Maryland Casualty agency force will be urged, persuaded, and possibly coerced into selling life insurance in the American General Life Insurance Company * * *.
>
> * * * * * *
>
> Much of the protection now enjoyed by the insureds of Maryland Casualty which derives from the independence of the agent will be lost if this combination is effected. Historically, the American Agency System has been dominant in the property-casualty insurance field, the property-casualty agent thus having a choice of placing each policy in one of several, or many, as the case may be, companies represented by the agent. His independence in large part arises from the fact that he can place a particular piece of business with one of several companies. Many agencies, particularly the smaller ones, cannot afford to have several insurance combines, such as Maryland Casualty and American General, in the office and the result will likely be that many agents will be required to discontinue representation of property-casualty companies long handled by the agency. Conversely, life agents have historically sold for but a single life insurer. Hence, the agent who heretofore has

placed his property-casualty business with several companies, including Maryland Casualty, and his life business with yet another separate company will find, if American General is successful in acquiring Maryland Casualty, that American General can and will make available to him "one stop" sales possibilities which may lead to the exclusion of all other insurance companies from the agency. To the extent that this condition obtains throughout the Maryland Casualty agency plant, the agent will become a captive agent and cannot pass to his customer his special abilities to get the best protection for the insured by shopping several companies with differences in coverage and price and competition between the insurance companies is lessened.

It is my considered opinion that the present proposed merger cures none of the problems that befall companies and which can be solved through the route of merger. In this case, the chief benefactor appears to be the American General Insurance Company and I believe the proposed merger will most certainly be detrimental to the Maryland Casualty stockholders, agents, and the insurance buying public. (Pp. 5-6 of Ex. I to Pl. Ex. 18.)

This is not idle speculation on Prof. Trosper's part. It is the considered judgment of a gentleman whose experience in the insurance business entitle his views to respect. See Ex. II to Pl. Ex. 18. But beyond this, Prof. Trosper's opinion is fortified by American General's own statement of its experience and of what it hopes to achieve by its proposed acquisition of Maryland. In the prospectus, for example, it is said:

> The American General Life Companies secure their business principally through sales representatives who give their full time and attention to the sale of insurance for the American General Life Companies. However, a significant and increasing volume of life insurance sales have been secured in recent years from general insurance agencies, primarily, but not exclusively, those who produce fire and casualty business for the American General Companies. *** (Pl. Ex. 11-A, p. 33.)
>
> ... * * * * * *
>
> The management of American General believes, assuming that American General gains working control of Maryland, that the proposed affiliation will benefit both

companies and their stockholders by combining the American General Group's predominantly life insurance business and the Maryland Group's property and casualty insurance business into one group capable of providing facilities for complete insurance service to both the insurance buyer and the insurance agent throughout most of the United States. It is the opinion of American General's management that so-called all-lines underwriting, e.g., the underwriting of all forms of insurance by a single integrated group of companies, has proven to be an especially effective and profitable method of conducting an insurance business * * *. It is believed that the * * * affiliation may enable the combined enterprise to accelerate substantially the rate of expansion of its life insurance business * * *.

It is also believed that increased productivity and efficiency, as well as certain economies, can be realized by the affiliation of the Groups, and that by extending the American General Group's life insurance facilities to Maryland's agencies the effectiveness of those agencies and the sale of life insurance may be increased. (Id., p. 3.)

It is clear, we believe, that American General's proposed takeover of Maryland will substantially impair and lessen competition between Maryland's agents and their competitors and between American General and its competitors in every line of insurance which American General writes.

There is yet another way in which American General's proposed acquisition of Maryland would violate § 7, namely, by preventing Maryland from engaging in the life insurance business. Indeed, as the undisputed evidence shows, American General's mere proposal to take over Maryland has completely frustrated Maryland's efforts to enter the life insurance field -- a field in which there is every reason to believe that with an agency force of more than 17,000 agents writing in excess of $418,000,000 of life insurance annually, Maryland could and would become a substantial factor if freed from the restraint imposed by American General's proposed acquisition. The acquisition is therefore unlawful because it suppresses potential competition. Directly in point are the Supreme Court's recent decisions

in United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964), and United States v. Penn-Olin Chemical Co., supra, 32 U.S. Law Week 4707 (June 22, 1964).

In the El Paso case, El Paso Natural Gas Company, the sole out-of-state supplier of natural gas to California, acquired Pacific Northwest Pipeline Corporation, a major pipeline serving parts of the trans-Rocky Mountain States, but not operating in California. The Court stated that the question presented was whether the acquisition was saved by findings to the effect that Pacific Northwest could not have entered California because of the lack of necessary distribution contracts, gas supplies, financing and regulatory approval. 376 U.S. at 657-658. Ruling that these findings were "irrelevant" (376 U.S. at 658), the Court held the acquisition to be unlawful.

It reasoned that although Pacific Northwest had no pipeline into California, it had attempted to enter the State and the record showed it to be a "substantial factor in the California market" because, as a "potential competitor," Pacific's "mere efforts * * * to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State." 376 U.S. at 658-659. In suppressing Pacific's "potential competition," the Court held, El Paso had substantially lessened competition within the meaning of § 7, and its acquisition of Pacific was therefore in violation of the section.

In the Penn-Olin case two large chemical companies organized a third corporation to engage in a joint venture of manufacturing and selling sodium chlorate in the southeastern section of the United States. Only one of the companies manufactured sodium chlorate, and neither company had a sodium chlorate plant in the southeast. The Government sought to

dissolve the joint venture as violative of § 7, and appealed from a District Court judgment in favor of the defendants.

The Supreme Court held that joint ventures were subject to § 7 (32 U.S. Law Week at 4709), and "the same considerations apply to joint ventures as to mergers." Id. at 4710. Examining the facts in the light of § 7 criteria, the Court reiterated the rule of the El Paso case and reversed and remanded on the ground that the lower court had failed to make adequate findings on the question whether there was a reasonable probability that the organization of the joint venture had substantially lessened potential competition, in that, in the absence of the venture, "one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor." Id. at 4712.

It is therefore clear that "the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent." United States v. Continental Can Co., 32 U.S.Law Week 4642,4646 (June 22, 1964). And Maryland's competition with American General in the life insurance business was not merely "probable and imminent," but certain and imminent. It also would have been -- and it still could be -- significant and substantial. Under the rule of El Paso and Penn-Olin, the suppression of such competition by American General's proposed acquisition of Maryland would violate § 7.

American General contends, however -- as it does with respect to § 1 of the Sherman Act -- that the market positions and shares of market with which we are here concerned, and the large number of companies engaged in the insurance business, are such as to preclude any ruling that American General's acquisition of Maryland could violate § 7. We readily acknowledge

that in these respects, the case at bar does indeed differ from any case heretofore decided under § 7 -- the market positions being lower, the shares of market smaller and the number of competitors larger. But it by no means follows that because shares of market are "the primary index of market power,"7/ American General's acquisition of Maryland would be lawful. For the arithmetical indicia of market structure on which American General relies are not the only criteria to be applied in determining whether a merger may substantially lessen competition in violation of § 7.

Since "the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act,"8/ one short answer to American General's market structure contention is to be found in the Supreme Court's ruling in the Union Pacific case, previously referred to. There, as the Court will recall, a merger which eliminated substantial competition between two major railroads was held to be in violation of § 1 of the Sherman Act regardless of the fact that the "competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads" (226 U.S. at 88), and, as the Court later stated, "without reference to the strength or weakness of whatever competition remained". United States v. First National Bank & Trust Co. of Lexington, supra, 376 U.S. at 670. No stricter test can be applied under § 7.9/

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7/ Brown Shoe Co. v. United States, supra, 370 U.S. at 322 (n. 38), 343; United States v. Continental Can Co., supra, 32 U.S. Law Week at 4646.

8/ Brown Shoe Co. v. United States, supra, 370 U.S. at 328-329, and notes 32 and 33 at 318-319.

9/ If, as we believe we have shown, American General's proposed acquisition of Maryland would violate the Sherman Act, it would necessarily violate § 7 of the Clayton Act.

But beyond this -- and in the context of articulating certain of the standards on which we rely -- the Supreme Court, in the Brown Shoe case, specifically noted that, "Each of these standards, couched in general language, reflects a conscious avoidance of exclusively mathematical tests * * *." 370 U.S. at 321, n. 36. The Court further declared that:

> Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anticompetitive effects of a merger were to be judged. Nor did it adopt a definition of the word "substantially," whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured. (370 U.S. at 320-321.)

Consistent with this -- and as shown by the cases dealing with potential competition[10/] -- evidence of shares of market are not essential to a determination that § 7 has been violated,[11/] and the acquisition of a share of market as small as 1.3% can bring about a substantial lessening of competition within the meaning of the section. United States v. Aluminum Co., 32 U.S. Law Week 4446, 4448, 4449 (June 1, 1964). For it is "the basic premise of [§ 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.'" Id., 32 U.S. Law Week at 4449; United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963).

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10/ United States v. El Paso Natural Gas Co., supra, 376 U.S. 651, 657-659; United States v. Penn-Olin Chemical Co., supra, 32 U.S. Law Week 4707-4710-12.

11/ See also United States v. Continental Can Co., supra, 32 U.S. Law Week at 4646.

## CONCLUSION

We submit that the record now before the Court shows that American General has violated both § 1 of the Sherman Act and § 7 of the Clayton Act. But if we are mistaken in this, we believe that, in addition to having shown immediate and irreparable injury, Maryland has surely "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation" -- in short, a showing which entitles Maryland to a preliminary injunction. Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2nd Cir. 1953).

Respectfully submitted,

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Dated: August 12, 1964

# APPENDIX

## STATUTES INVOLVED

Sherman Act
15 U.S.C. § 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the States, or with foreign nations, is declared to be illegal:"

Clayton Act
15 U.S.C. § 15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee.

15 U.S.C. § 18

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

15 U.S.C. § 22

"Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

15 U.S.C. § 26

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings * * * and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue:"

Judicial Code
28 U.S.C. § 1292(a)(1)

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 U.S.C. § 1336

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

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| AMERICAN GENERAL LIFE INSURANCE COMPANY OF DELAWARE, et al, | : | IN THE SUPERIOR COURT OF BALTIMORE CITY |
| Petitioners | : | |
| vs. | : | File No. 87012 |
| H. ELLSWORTH MILLER, President MARYLAND CASUALTY COMPANY, et al | : | Docket 1964 Folio 784 |
| Defendants | : | |

.. .. .. .. ..

MEMORANDUM OPINION

On June 1, 1964 the Petitioners filed a Petition in the Superior Court of Baltimore City for the issuance of a Writ of Mandamus to the Defendants "commanding them and each of them to immediately suffer and permit John W. Cable, III, as agent and attorney for the Petitioners to inspect and copy, during usual business hours, the stock ledger of Maryland Casualty as provided by Section 51 of Article 23 of the Annotated Code of Public General Laws of Maryland (1957) and as otherwise permitted by law".

The Petitioners allege the demands of the Petitioners as owners of shares of the common stock of Maryland Casualty Company ("Maryland Casualty") and the Petition recites that stockholders owning in excess of 5% of the shares of Maryland Casualty for at least 6 months prior to the demand, had demanded in writing of Maryland Casualty by letters addressed to it, to the attention of Mr. Miller, as its President, the receipt of which letters was acknowledged by Mr. Morton, as Secretary, demanding the right to inspect and copy the stock ledger of Maryland Casualty by Mr. Cable as their attorney and agent, as provided by Article 23, Section 51 of the Maryland Code or as otherwise permitted by law, in order to provide American General Insurance Company ("American General") with the information necessary to make an offer direct to the

holders of Maryland Casualty stock to exchange shares of American General for their shares of Maryland Casualty. It was also stated that it was believed that it was in the best interests of stockholders of Maryland Casualty that they be offered an opportunity to evaluate "the proposed offer of American General".

It is further alleged that these demands (the making of which are undisputed) were referred to Piper & Marbury as counsel for Maryland Casualty and that on May 26, 1964 Mr. Cable was advised by McKenny W. Egerton, one of the partners of Piper & Marbury, on behalf of Maryland Casualty and of that firm, that:

> "The purposes of such examination as stated in your letter are, in the opinion of the Company, not a proper ground for examination and are contrary to the best interests of the Company and its stockholders. Accordingly, a decision has been reached by the Company with our advice to resist examination and to deny your request".

The individual Defendants are identified in the Petition as the President, Secretary and Treasurer, respectively of Maryland Casualty and Mercantile-Safe Deposit and Trust Company ("Mercantile-Safe") is described as the Stock Transfer Agent for Maryland Casualty. Photostatic copies of the relevant correspondence are attached as Exhibits to the Petition.

It is also alleged in the Petition that the intentional denial by the Defendants of the requests of the Petitioners is a peremptory refusal to perform a ministerial act required by the statutory provision already mentioned, which statutory authority presents a clear and unequivocal right not dependent upon discretion or personal judgment and the refusal is contrary to law.

This Court, acting under Rule 309 of the Maryland Rules of Procedure, upon a Petition of the same Petitioners, shortened the time to answer the original Petition until June 18, 1964.

Mercantile-Safe, on June 17, 1964, filed its Answer to the Petition for the Writ of Mandamus admitting that the Petitioners, according to its Stock Transfer Records, were registered holders of Maryland Casualty stock for at least 6 months prior to the filing of the Petition and that the Petitioners held in the aggregate in excess of 340,000 shares. The Answer admitted the allegations of Paragraph 2 of the Petition (identifying the Defendants), but recited that it had no knowledge of the other matters and facts set forth in the Petition (with certain minor exceptions) and particularly that it had no knowledge that "the authorizations and requests of the Petitioners constituted a lawful request to permit such Petitioners to inspect transfer records relating to the stock of Maryland Casualty Company". In further answer to the Petition, the Answer sets forth that "no copies of the correspondence and documents referred to in the Petition have been submitted to it, nor, prior to the institution of this suit, has any demand been made upon it by the Petitioners for inspection of the stock transfer records of Maryland Casualty Company". There is no affidavit attached to this Answer.

On June 18, 1964 the three natural Defendants, officers of Maryland Casualty, filed their Answer to the Petition. With certain minor and unimportant exceptions, the allegations of fact in the Petition are admitted, but all the conclusionary allegations are denied. The important allegations in this Answer appear in Paragraphs 15 to 21 in further answer to the Petition. In view of the demurrer to this Answer, it is necessary to set forth the allegations in these Paragraphs somewhat fully.

In Paragraph 15 it is alleged that Article 23, Section 51 of the Maryland Code does not grant an absolute right of inspection of the stock ledger or other records of a Corporation, and that the Court of Appeals of Maryland has

held that the right of inspection granted by that section is limited to cases where "lawful, proper and legitimate purposes are to be served".

In Paragraph 16 the purpose alleged in Paragraph 3 of the Petition is alleged, i.e. to provide American General with information necessary to make an offer direct to holders of Maryland Casualty stock to exchange shares of American General for their shares of Maryland Casualty.

Paragraph 17 contains the allegations in regard to the applicable provisions of the Securities Act of 1933 (the Act), the filing of a Form S-1 Registration Statement and the alleged violation of the provisions of that Act and applicable Rules of the Securities and Exchange Commission (the Commission). The applicable provisions of the Act are: Section 5 (15 U.S.C. 77-c) which prohibits (1) the making of an exchange offer until the issuing corporation has filed a Registration Statement and (2) the transmission of the prospectus unless such prospectus meets the requirements of Section 10 of the Act (15 U.S.C. Section 77j) and (3) the exchange or acceptance of offers of exchange unless and until the Commission permits the Registration Statement to become effective; Sections 12 and 17 of the Act (15 U.S.C. Secs. 77b and 77q, respectively) which prohibit offers to exchange or exchanges of a security if there is an omission to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

It is then alleged in Paragraph 17 that purporting to act in accordance with the Act, General American filed a Form S-1 Registration Statement on May 20, 1964. A copy of this elaborate and detailed document, consisting of 122 large legal size pages, with much comparative and other financial data, is filed as Exhibit A and made part of the Answer. The Form S-1 Registration Statement contains the Preliminary Prospectus ("the 'Red Herring' Prospectus")

consisting of 45 pages with Financial Statements of 29 pages.

It was further alleged that on June 11, 1964 counsel for Maryland Casualty wrote a letter to the Commission setting forth numerous deficiencies in the Registration Statement. A copy of this letter is attached, and made a part of the Answer, as Exhibit B. This Exhibit contains 12 single spaced pages of material and had attached to it a copy of a 1964 Price Comparison, showing high and low bids, of 17 Life Insurance Company stocks and a copy of a letter, dated January 27, 1964 from Merrill Lynch, Pierce, Fenner & Smith, by Winthrop C. Lenz, to the Executive Committee of Maryland Casualty, consisting of 4 full single spaced typewritten pages reviewing the proposal of American General to Maryland Casualty for an affiliation through an exchange of stock. After a full analysis of the proposal and various relevant factors, the conclusion was as follows:

> "Thus we do not believe it is in the best interests of the Maryland Casualty Company to accept the proposal as made by American General".

There are 7 reasons given why the proposal is allegedly not in the best interests of Maryland Casualty and is not in the best interests of its stockholders. These are taken from the Merrill Lynch, Pierce, Fenner & Smith report of January 27, 1964. The letter of June 11, 1964 then sets out in detail, with reference to the pages in the Registration Statement, the alleged deficiencies in the Registration Statement to apprise adequately the Maryland Casualty stockholders of the fundamental disadvantages of the proposal and to disclose fully pertinent facts. There are 45 alleged deficiencies which are stated to make the Registration Statement defective under the Act, to make it deceptive and otherwise insufficient. It is not necessary to list these alleged deficiencies here. Some will be considered later in this Opinion.

It is further alleged in Paragraph 17 of the Answer that as of the date of the filing of the Answer, the Commission has not permitted the Registration Statement to become effective and, on information and belief, that the Commission is reviewing all aspects of the Registration Statement including the matters set forth in the letter of June 9, 1964. It is further pointed out that for the reasons set forth in the letter of June 9, 1964, under the applicable provisions of the Act and of Rule 433 of the Commission, the preliminary or "red herring" prospectus cannot legally be sent to stockholders of Maryland Casualty at this time because (1) it does not comply with Sections 5 and 10 of the Act and Rule 433, (2) it is misleading for failing fairly or fully to present relevant and material facts regarding the proposed exchange, necessary, in light of the circumstances under which other statements are made, to make such statements not misleading, so as to permit the stockholders of Maryland Casualty adequately to evaluate the exchange offer. It is concluded that "as no exchanges may be made nor offers of exchange accepted until the Registration Statement becomes effective and since the preliminary prospectus cannot be used in its present form without violating the Act and the Rules, no lawful, proper and legitimate purpose can be served by making the stock ledger available at the present time".

Paragraph 18 points out that the Act commits the actual dispute in the case to the jurisdiction of the Commission and unless and until the Commission permits the Registration Statement to become effective, there can be no proper and legitimate purpose for the request for inspection now made.

In Paragraph 19 it is alleged that the Petition should not be granted because the offer is unfair, inequitable and totally inadequate to safeguard the interest of Maryland Casualty's stockholders and would not be in the best

interests of Maryland Casualty. It is alleged that for these reasons the demand is not for a lawful, proper or legitimate purpose and further, that in the exercise of the Court's discretion, the petition should be denied for those reasons.

It is alleged in Paragraph 20 that the comments on page 9 of Exhibit B (the letter of June 11, 1963) as to page 12 of the prospectus show that "there may be disclosed significant matters which defendants believe may raise serious questions under the applicable Federal or State of Texas Anti-Trust Laws. Such facts may bring to light, prior to the effectiveness of the Registration Statement, that the consummation of the exchange would or might be illegal as in violation of such laws and that, accordingly, the inspection demanded would be for an unlawful purpose". It is further alleged that as no exchanges can be made until such information has come to light, "no lawful, proper and legitimate purpose can be served by making the stock ledger available at this time".

In Paragraph 21, it is alleged that no exchanges can be made under the blue-sky or securities laws or laws in their nature administered by insurance authorities of a great majority of the States until qualifications or clearances under such laws are given. On information and belief it is alleged that no such clearances have been received by American General or its dealer-manager, or others, and inasmuch as no exchange can be made until such clearances are received, no lawful, proper or legitimate purpose can be served by making the stock ledger available at this time.

It is prayed that the Court deny the Petition, dismiss the proceeding and award costs to the Defendants.

On June 22, 1964, the Petitioners filed demurrers to both the Answer of Mercantile-Safe and the Answer of the other Defendants.

The demurrer to the Answer of Mercantile-Safe sets forth two reasons:

1. The Answer does not comply with Section b of Maryland Rule BE 41 in that the answer is not verfied and does not fully and specifically set forth all of the defenses upon which the Defendant intends to rely.

2. It alleged no facts, individually or in the aggregate, which are sufficient to authorize a refusal to issue a Writ of Mandamus to compel compliance with Article 23, Section 51, Sub-section B of the Maryland Code.

The demurrer to the Answer of Messrs. Miller, Morton and Garner alleges:

1. The Answer admits the proper percentage of stock ownership, the duration of such ownership and demands for inspection of the stock ledger and the reasons alleged for non-compliance are insufficient in law.

2. Article 23, Section 51, sub-section B does not vest any discretion in the Defendants to refuse the lawful request of the Petitioners who, as a matter of law, are entitled to a Writ of Mandamus to require the Defendants to comply with the statutory requirement.

3. No facts, individually or collectively, are alleged which are sufficient in law to justify a refusal to comply with the requests of the Petitioners.

The hearing on the Demurrers was held on July 2, 1964. Helpful and well prepared Memoranda were submitted in advance by counsel for the parties and the matter was well argued before the Court. The Court is grateful to counsel for their help and wants particularly to thank counsel for the Petitioners for the photostatic copies of the opinions in the 25 cases on which they principally rely. These were most helpful to the Court and enabled the Court to reach a decision much earlier than would have been the case without this assistance.

Article 23, Section 51, Sub-section (b) of the Maryland Code, provides, in part, as follows:

> "(b) Holders of five per cent of capital stock - Any one or more persons who are and for at least six months have been stockholders of record of five per cent, in the aggregate, of the capital stock of any class of a corporation of this State.
> (1) May, upon written request, inspect and copy, in person or by agent or attorney, during usual business hours, the corporation's books of account and the stock ledger."

The Court of Appeals of Maryland, in construing a similar earlier statute indicated, in 1898, that the right of a stockholder of a corporation to inspect the books and records of that corporation, including the stock ledger, if the required statutory conditions existed, could be denied by the officers of the corporation if the application to inspect was made for "some evil, improper or unlawful purpose". Weihenmayer v. Bitner, 88 Md. 325, 333; 42 A.245, (1898, Bryan, J.). This dictum was cited with approval and applied by the Court of Appeals in Wight v. Beublein, 111 Md. 649, 75 A.507, (1910, Briscoe, J.). In the Wight case a stockholder was refused by the officers of the Corporation inspection of the books and records of the corporation by an auditing company. A petition for a Writ of Mandamus was filed by the stockholder's agent, against the President and Secretary-treasurer of the Corporation, commanding them to suffer and permit the stockholder and the auditing company to have access to its books and records for the purpose of examining them and of making a full report to the stockholders at his expense. The Defendants in that case set out in their Answer that the request for inspection was not made in good faith in that the object of the examination was to compel the corporation to give the stockholder, as a dealer in the Corporation's product, an advantage not enjoyed by other dealers and the proposed inspection was not to

obtain information as to the financial condition of the company but was to harass the defendants and to compel them to purchase the Petitioner's shares at a price above their real value. The Petitioner demurred to this Answer. The trial court sustained the Demurrer and directed the Writ of Mandamus to issue as prayed. The order of the trial court was reversed on appeal. The Court of Appeals held that the facts alleged, if proved at the trial, would establish an improper purpose for the request for inspection and would be a good legal defense to the petition. The case was remanded for further proceedings.

Judge Briscoe, speaking for the Court, stated at page 657 of 111 Md.:

> "This section of the Code (Art. 23, sec. 5) was before this Court for construction in Weihenmayer v. Bitner, 88 Md. 333, and we there held the right is given to him as a stockholder by statute, and is absolute and not made to depend upon any circumstance but the ownerships of the stock. It was also said it is easy to see that there might be good reasons for refusing an application, for instance, if it was made for some evil, improper or unlawful purpose. And if such purpose were alleged and proved the writ would be denied. "The general rule as stated by this Court in Weihenmayer v. Bitner, supra, is supported by the weight of authority in the States and Supreme Court of the United States. Foster v. White, 86 Ala. 471; Guthrie v. Harkness, 199 U. S. 155".

See also Homer v. Crown, Cork & Seal Co. 155 Md. 66, 76; 141 A.425 (1928, Parke, J.), citing Wight v. Heublein with approval.

As Judge Briscoe pointed out in Wight v. Heublein, the rule adopted in Maryland follows the weight of authority in the United States. See in this connection and with the problems presented in this case generally, the excellent annotation entitled, "purposes for which books and records", 15 A.L.R. 2d 11.

It is elementary that the demurrer of the Petitioners to the Answer filed in this case admit, for the purposes of the argument on demurrer, the well

pleaded facts in those Answers. This rule was stated and applied in Wight v. Heublein.

The decisive question in the case at bar is whether the facts alleged in the Answer of the three corporate officers indicate an improper or illegal purpose for the requested inspection and copying of the stock ledger book. The answer to this question turns on whether the alleged facts indicating a violation of the Act and the defective nature of the Registration Statement under the Act and the deceptive nature of the proposed offer of exchange inheres directly in the purpose for the inspection. This is an important consideration as the courts generally have held that if the purpose of the inspection is lawful, the fact that sometime in the future a possible, but unproved, improper use may result will not justify the officers of the corporation in refusing the requested inspection. In the absence of allegation or proof of a presently established illegal or improper purpose, the Courts will not assume unlawful use of the information obtained or speculate on what such a possibly unlawful or improper use might be.

See Murchison v. Allegheny Corporation, 210 N.Y.S. 2d 153, 160 (1961, S.Ct. of N.Y. Spec. Term N.Y. Co., Jacob Markowitz, J.) affirmed, per curiam, N.Y.S. 2d 975 (1961 App.Dis.) Appeal denied, 212 N.Y.S. 2d 997.

If no improper motive has been alleged or proved, requests for inspection and copying of stockholders' lists have been sustained where the purpose was to enable the requesting stockholders to make an offer to purchase stock of the company. E. L. Bruce Co. v. State, 51 Del. 252, 144A 2nd 533 (1958,S.Ct. of Del., Per Curiam)

Florida Telephone Corporation v. State, (Fla.), 111 So.2d 677 (1959, Dist. Ct.of App. of Fla. 1st Dist., Sturgis, C.J.)

Fiest v. Joseph Dixon Crucible Co., 30 N.J. Super. 153, 103A.2d 893 (1954, Sup. Ct. of N.J., App. Div., Eastwood, S.J.A.D.)

Crouse v. Rogers Park Apartments, Inc., 343 Ill.App.319, 99 N.J. 2d 404 (1951, App. Ct. of Ill., 1st Dist. 2nd Dis. Schwartz, P.J.)

Such requests for the purpose of promoting a prospective merger or other combination with another corporation have been held proper.

Application of George F. Huber, Sr. 210 N.Y.S. 2d 211 (1960 S.Ct. of N.Y., Spec. Term, N.Y.CO., Henry Epstein, J.)

Hanrahan v. Puget Sound Power & Light Co., 332 Mass. 586 126 N.J. 2d 499 (1955, S.Jud.Ct. of Mass., Spalding, J.)

Requests for the purpose of soliciting proxies to effect a change in management have been held proper.

Nationwide Corp. v. Northwestern National Life Insurance Co., 251 Minn. 255, 87 N.W. 2nd 671 (1958, S.Ct. of Minn., Knutson, J.).

Murchinson v. Alleghany Corporation, 210 N.Y.S. 2d 153, supra.

Loveland v. Tutwiler Investment Co., 240 Ala. 424, 199 So. 854 (1941, S.Ct. of Ala., Bouldin, J.)

Insuranshares Corporation v. Kirchner, 40 Del. 105, 5 A.2d 519 (1939, S.Ct.Del., Layton, C.J.)

The Courts have also held that in seeking a stockholders list by a stockholder to solicit proxies to change the management, the inspection should not be denied because the stockholder has not, at the time of the request, complied with the Regulations of the Commission, but intends to do so in the future.

Alabama Gas Corporation v. Morrow, 265 Ala. 604, 93 So. 2d 515 (1957, S.Ct. of Ala., Lawson, J.)

Application of Joslyn, 78 N.Y.S. 2d 183 (1948, S.Ct. of N.Y., Spec. Term N.Y.Co.,

Miller, J.); affirmed, Joslyn v. Universal Laboratories, 78 N.Y.S. 2d 923, 273 App. Div. 945 (1948).

There is, however, a vital distinction in the case at bar from all of the cases cited, including Alabama Gas Corporation v. Morrow, Application of Joslyn, and Nationwide Corporation v. Northwestern National Life Insurance Co. In the case at bar the proposal for the exchange of stock is a definite, specific proposal which is incorporated in a Registration Statement which was presented to the Commission prior to the filing of the Petition for a Writ of Mandamus in this case. The specific proposal had been the subject matter of discussions for several months prior to the filing of the Registration Statement. The compliance of the Registration Statement, including the "red herring" prospectus with the Act, is a condition precedent to the submission of the offer or the acceptance of offers in connection with the exchange and the Answer of the three officers of Maryland Casualty alleges facts which show a failure to comply with the Act or Regulations.

The Petitioners urge that the Answer is cast in too general terms and with mere conclusions to sustain this defense, as well as the other defenses set forth. It is quite well settled that there must be allegations of positive and definite facts in an Answer in a Mandamus case to sustain the alleged defense. Pennington v. Gilbert, 148 Md. 649, 129 A 905, (1925 Walsh, J.). The Court of Appeals cited with approval and followed City of Chicago v. People, 215 Ill. 235, quoting from the Opinion in that case as follows at page 654 of 148 Md.:

> " 'When a petition for a writ of mandamus is filed, the answer of the respondent must state positive and definite facts upon which it relies for defense. The conclusions of the pleader are not sufficient, and, if the answer consists merely of general statements and conclusions, the relief will be granted'"

The Answer of the three Corporate officers does not suffer from this vice. Exhibits A and B, attached to and made a part of the Answer contains allegations of fact - positive and definite - quite sufficient if established, to sustain the defense. The relevant facts regarding the proposed exchange, which are necessary to disclose in order to prevent the Registration Statement from being misleading, in light of the circumstances under which the statements have been made, appear particularly on pages 3 to 11 of Exhibit B. The failure to make these disclosures of fact would prevent the stockholders of Maryland Casualty adequately to evaluate the exchange offer and thus frustrate the purpose of the Act and the Regulations.

For example, on the cover page of the Regulation Statement, there is no indication, with cross-reference to material in an Introductory Statement, of the fact that the Board of Directors of Maryland Casualty considers the offer unfair and inequitable to its stockholders, has recommended that it not be accepted and that it will oppose the exchange offer "by all available legal means". There is no indication that approximately 95% of the fire and casualty business of American General is within two states - Oregon and Texas - as contrasted with a wide national distribution for the business of Maryland Casualty. There is no statement that the offer of exchange cannot legally be made from within the State of New York; that no market for the new preferred stock of American General can under New York law be established or made in that state for an indefinite period of time, if ever; that exchanges made by Maryland Casualty stockholders must be subject to the Federal income tax under the Ruling (if obtained) and under the opinions of counsel, unless 80% or more of the outstanding shares of Maryland Casualty are exchanged, that any tender of shares of Maryland Casualty will be irrevocable; that no estimated cost to

American General of the cost for procuring exchanges and the high relation of this cost to total capital and surplus of American General should be disclosed and that the diminution of earnings and book value for the combined operation should be shown. A large number of specific statements of fact and conclusions of fact appear in Exhibit B in regard to various pages of the Registration Statement, but these need not be set forth in detail here. It is sufficient to indicate that the Court's opinion, most of these statements of fact or conclusions of fact should be included in order to make the Registration Statement not misleading and to enable the stockholders of Maryland Casualty adequately to evaluate the offer of exchange.

Under these circumstances the demurrer to the Answer admits, for the purposes of the argument on demurrer, that the Registration Statement and the "red herring" prospectus, a necessary offering document, is illegal under the Act. The necessary means to make the offer of exchange cannot be separated from the offer of exchange itself. They inhere directly and presently in the object for the examination of the stock ledger, and are all part of the object itself.

It was argued that the matters involving the legality of the Registration Statement are within the jurisdiction of the Commission and not of this Court, and this Court should decline to consider them in this case. It is clear, however, that the Act does not confer exclusive jurisdiction on the Courts of the United States to enforce the liabilities and duties created by the Act. On the contrary, the Act expressly states that the District Courts of the United States have concurrent jurisdiction with the State and Territorial Courts to enforce any liability or duty created by the Act.

It is not necessary for the Court to decide whether the other grounds for

alleged illegality or impropriety of purpose set forth in Paragraphs 19, 20 and 21 of the Answer of the three corporate officers are sufficient of themselves to constitute a sufficient defense to the Petitioner, but these grounds have some weight when addressed to the exercise by the Court of its sound discretion in the granting or refusing of the issuance of a Writ of Mandamus in this case.

In Paragraph 19 it was alleged that the offer is improper because it is unfair, inequitable and totally inadequate to safeguard the interest of Maryland Casualty's stockholders and would not be in the best interest of Maryland Casualty. This general conclusion is amplified and made specific by the letter of January 27, 1964 from Merrill Lynch, Pierce, Fenner and Smith attached to Exhibit B. Some Courts take the position that the purpose for the inspection must not only be lawful but must also be one which "seeks to protect the interest of the Corporation". See Sowers v. American Phenolic Corp., 404 Ill. 440, 89 NE 2d 374, 15 A.L.R. 2d 11 (1949, S.Ct. of Ill., Fulton, J.) This Court however, is of the opinion that in a situation like the one at Bar involving an offer of exchange of stock, the merits of the proposal should be determined by the stockholders of the Maryland Casualty themselves, if, as and when the offer is validly and lawfully presented to them with a proper disclosure of relevant facts as required by the Act and Regulations as otherwise required by law. The strong showing, prima facie, of an inequitable and inadequate offer, however, so far as Maryland Casualty and its stockholders are concerned, should lead the Court to examine carefully the propriety for the issuance of a Writ of Mandamus in this case.

In Paragraph 21, it is alleged that serious questions may be disclosed under the appropriate Federal and Texas Anti-Trust Laws if the proposed offer of exchange is consummated. Although not appearing in the Answer and therefore, not properly before the Court on the Demurrer to the Answer, the Court did observe in the Morning Sun of July 8, 1964 that Judge Joseph A. McGarraghy of the United States District Court for the District of Columbia passed a temporary restraining order against American General from making the stock exchange offer, the complaint indicating that the acquisition of Maryland Casualty stock by American General would violate the Sherman and Clayton Anti-Trust Acts. The temporary restraining order was stated to be effective until July 17th, with a hearing on a preliminary injunction on July 15th. This Court is of the opinion that the possibility of violation of the Anti-Trust laws of the United States or of Texas as and when the offer was consummated would not, under the authorities above cited be sufficient, in and of itself, to justify a refusal to permit the examination of the stock ledger. Here again, the allegation should lead this Court to examine carefully the propriety for the issuance of the Writ of Mandamus.

The same comment may be made as to the last ground of defense set forth in Paragraph 21 of the Answer, namely, that no exchange can be made under the blue-sky laws of a number of States until the insurance authorities of these states have issued clearances for the offer. It was stated in argument that the Insurance Commissioner in North Carolina had denied permission for the exchange offer to be made in that State on the day the Answer was filed and too late to be incorporated in the Answer, but, as above indicated, this cannot properly be considered by this Court

as it is not alleged in the Answer. The general allegation in Paragraph 21 would not seem to the Court to be sufficient to itself to justify a refusal but leads the Court to examine carefully the propriety for the issunnce of the Writ of Mandamus.

The demurrer to the Answer of Mercantile Safe must also be overruled. It is true that no affidavit was attached to the Answer as required by Maryland Rule B E 41. This however, is not a proper ground for demurrer as it does not answer itself. It would have been a proper ground for a Motion Ne Recipiatur or to strike under Maryland Rule 322, but such a Motion was not filed. It was indicated at the argument by the solicitor for Mercantile Safe that the affidavit could and would be supplied if it became necessary.

The demurrer of the Petitioners to the Answer of Mercantile-Safe, however, mounts up to the first error in the pleading. See Doughty v. Prettyman, 219 Md. 83, 93; 148 A 2d 438 (1959 Oppenheimer, J.) The Court is of the opinion that the Petition states no proper ground for the issuance of a Writ of Mandamus against Mercantile-Safe, as the stock transfer agent of Maryland Casualty, in that it fails to allege that it had obtained from Maryland Casualty, as its principal, authority to permit such an examination. This is a condition precedent to the issuance of a Writ of Mandamus against a stock transfer agent. See Sterling v. City National Bank and Trust Co., of Chicago, 17 Ill. App. 2d 340, 149 NE 2d 789, (App. Ct. of Ill. First Dist. 2nd Div., 1958, Lewe, J.)

Then too, where the Court has determined that the requested inspection is for an illegal and improper purpose it is obvious that no such authorization will be forthcoming from the principal and that the

stock transfer agent could not lawfully permit the requested inspection.

For the reasons stated, the Court will overrule the demurrers to both the Answers of the three Corporate officers and of Mercantile-Safe.

The question arises as to whether upon the overruling of the demurrers the Court would forthwith render judgment for the Defendants for costs or proceed further with a hearing upon the allegations in the Answers. It is well settled that if the facts are undisputed, the Court, upon overruling a demurrer to the Answer, may enter formal judgment in favor of the Defendant for costs. Johnson v. Duke, 180 Md. 434, 24 A 2d. 304, 306 (1942, Delaplaine, J.) If, however, there are facts alleged in the Answer which may be disputed or explained, the Court should have further proceedings to determine those facts. See Wight v. Heublein, 111 Md. 649, supra at 659.

Although most of the facts alleged in the Answer of the three Corporate officers appear to be undisputed, the Court is not sure of this and it would seem appropriate at this time, merely to overrule the demurrer to the Answers. If the Petitioners do not desire to proceed further, they may file a Petition setting that forth and the Court will then enter a final order in favor of the Defendants for costs. If the Petitioners desire to proceed further, a convenient time for a hearing may be arranged at a conference between the Court and the Solicitors for the parties. In this latter event, Mercantile-Safe is given leave to file an affidavit to its Answer within 10 days from the date of the conference fixing the time for a further hearing.

Wilson K. Barnes
Judge

Filed: July 29, 1964

IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 18,8[illegible]

FILED AUG 12 1964

Nathan J. Paulson
CLERK

MARYLAND CASUALTY COMPANY, *Appellant*,

v.

AMERICAN GENERAL INSURANCE COMPANY, ET AL., *Appellees*.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR APPELLEES

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## QUESTION PRESENTED

In this case Maryland Casualty Company charges that American General Insurance Company is attempting to acquire control of Maryland Casualty Company in violation of Section 1 of the Sherman Act (15 U.S.C. 1) and Section 7 of the Clayton Act (15 U.S.C. 18) through a public offer to the stockholders of Maryland Casualty Company to exchange stock in the American General Insurance Company for stock of Maryland Casualty Company.

The question presented on this appeal is whether the injunction granted by the court below which enjoins defendants from exercising any control over, merging with, changing the management of, or changing or interfering with the policies, practices and personnel of Maryland *pendente lite* is clearly erroneous and an abuse of discretion merely because it does not also enjoin American General from acquiring title to stock of Maryland.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,802

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MARYLAND CASUALTY COMPANY, *Appellant*,

v.

AMERICAN GENERAL INSURANCE COMPANY, ET AL., *Appellees*.

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## BRIEF FOR APPELLEES

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### STATEMENT OF THE CASE

#### I. The Proceedings in the District Court.

This action was instituted by the filing of a complaint by Maryland Casualty Company on July 7, 1964.[1] The complaint named as defendants American General Insurance Company, a Texas corporation; American General Life

[1] Maryland Casualty Company is hereinafter sometimes referred to as "Maryland". Maryland and its subsidiary and affiliated companies are hereinafter sometimes referred to collectively as "The Maryland Group".

Insurance Company of Delaware, a Delaware corporation; and American General Life Insurance Company, a Texas corporation.[2]

The complaint alleged, among other things, that American General proposed to obtain control of Maryland by making a public offering to the shareholders of Maryland to exchange stock of American General for stock of Maryland (Par. 13-15). The complaint further alleged that the acquisition of control of Maryland by American General would substantially lessen competition in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act (Par. 21-22). The charge with respect to Section 1 of the Sherman Act included an allegation that the corporate defendants and three named co-conspirators were engaged in a conspiracy to violate that section of the statute (Par. 21). The three named co-conspirators are Gus S. Wortham, President of American General; Benjamin N. Woodson, President of American General Life Insurance Company of Texas, and American General Life Insurance Company of Delaware; and Insurance Securities Incorporated, a California corporation which is engaged in the business of administering an unincorporated open end investment company that holds stock in a large number of insurance companies (Pars. 4-6). The complaint prayed for injunctive relief to prevent consummation of the proposed exchange offer and also sought treble damages.

On the same day that the complaint was filed the plaintiff, upon notice to the defendants, moved for a temporary restraining order. At 3:30 p.m. on that day, the District Court, after having heard counsel, issued a temporary re-

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[2] American General Insurance Company is hereinafter sometimes referred to as "American General". American General and its subsidiary and affiliated companies are hereinafter sometimes referred to collectively as "The American Group". The companies in The American Group that are engaged in writing life insurance, including American General Life Insurance Company of Delaware and American General Life Insurance Company (Texas), are hereinafter sometimes referred to collectively as "The American Life Companies".

straining order which prevented defendants from taking any further steps toward consummation of the exchange offer pending a hearing on plaintiff's motion for a preliminary injunction. By its terms the temporary restraining order was to expire on July 17, 1964. It was thereafter extended to July 27, 1964, and, after the decision of the District Court, it was again extended until such time as this Court should act on the plaintiff's motion for a temporary restraining order. On July 31, 1964, this Court denied Maryland's motion for a temporary restraining order and on August 4, 1964, denied a motion for reconsideration.

With the complaint the plaintiff filed a motion for a preliminary injunction. The hearing on this motion began on July 15 and continued until July 21. Numerous affidavits and other documentary exhibits were admitted in evidence and oral testimony was taken from 13 witnesses.

During the course of the hearing American General offered a unilateral stipulation together with a form of preliminary injunction based on the stipulation (Def. Exs. 7 and 8). By the stipulation American General agreed to the issuance of a preliminary injunction which would prevent it from exercising any control over, merging with, changing the management of, or changing or interfering with the policies, practices and personnel of Maryland, pending a final determination on the merits.

On July 27, 1964, the District Court handed down a memorandum opinion and findings of fact and conclusions of law. In the memorandum opinion the District Court stated:

> "Upon consideration of all of the evidence, I have concluded that the preliminary injunction sought by the plaintiff should not issue and that the defendant should be permitted to proceed with its proposed Offer of Exchange subject to an Order of this Court under which the present status of Maryland management, policies, personnel and assets will be maintained, and the stock proposed to be acquired by the defendants

> will not thereafter be transferred except pursuant to an Order of the Court, until the entry of an Order at final hearing on the merits, at which time, if the Court should determine that the proposed merger is in violation of law, it can then order a divestiture of the Maryland stock acquired by the defendants."

The District Court made the following findings of fact among others:

1. That any possible injury claimed to be threatened to Maryland by reason of the exchange offer would be the result of changes in the management of Maryland, changes in its corporate structure, the merging or consolidating of Maryland with American General or the intermingling of assets of Maryland with the assets of American General, and from changes in the policies, practices and personnel of Maryland particularly those relating to its relations with its fire and casualty agents (Finding of Fact 32).

2. That Maryland would not suffer any irreparable injury by reason of American General carrying out the proposed exchange offer and thereafter holding any common stock of Maryland received through the exchange offer if pending a final determination of the action American General should be restrained from changing the management of Maryland, merging or consolidating Maryland with American General or commingling the assets of Maryland with the assets of American General and from making any change in the policies, practices and personnel of Maryland (Finding of Fact 35).

3. That if the court should issue a preliminary injunction prohibiting American General from going forward with the Offer of Exchange American General would withdraw the offer because it would be impossible and not consistent with good business practice for American General to keep open an Offer of Exchange involving securities with an approximate value of $240,000,000 over the period of

time that would be required for a final determination of the case, including proceedings in the appellate courts; that American General had incurred out of pocket expenses in the amount of $485,000 in connection with the preparation of a registration statement filed with the Securities and Exchange Commission with respect to the Offer of Exchange, and that if the court should issue a preliminary injunction American General would have to withdraw the registration statement (Finding of Fact 36).

4. That if a preliminary injunction should be issued it would have the effect of determining the case on the merits and would result in irreparable damage and injury to American General and to the stockholders of Maryland who would be deprived of the opportunity to exchange their stock pursuant to the terms of the Offer of Exchange (Finding of Fact 38).

On the basis of these findings of fact the court concluded that the issuance of a preliminary injunction based on the stipulation filed by American General would protect the plaintiff against any possible irreparable injury; that the issuance of a preliminary injunction in the form prayed for by the plaintiff prohibiting the making of the Offer of Exchange and the consummation of exchanges with any shareholders of Maryland who wished to take advantage of the offer would, in effect, finally determine the case on the merits, inflict irreparable injury on the defendants and bring about an irreparable loss of value in the common stock now held by the stockholders of Maryland; and that such an injunction was unnecessary to protect the plaintiff from any possible injury (Conclusions of Law 4 and 5).

The District Court also made detailed findings of fact with respect to the lines of commerce and relevant markets involved (Findings of Fact 8-19) and on the effect of the proposed acquisition on competition (Findings of Fact 28-31). On the basis of those findings, the court concluded

as a matter of law that the plaintiff had made no showing that the effect of the acquisition of stock by American General would substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country in violation of Section 7 of the Clayton Act, and that the plaintiff had made no showing that the acquisitions of the stock would violate Section 1 of the Sherman Act. The court concluded that the plaintiff had failed to show that there was either a reasonable probability or a reasonable certainty that it would ultimately prevail on the merits (Conclusions of Law 6-8).

In its findings of fact and conclusions of law the court rejected the argument of American General that the court had no jurisdiction of the subject matter of the case because of the provisions of the McCarran Act (15 U.S.C. 1011-1015). The court based this conclusion on a finding that the Texas and Maryland statutes do not provide for adequate or effective regulation of the proposed acquisition of control of Maryland by American General and that there is therefore no applicable state regulation that precludes a suit under the federal antitrust laws (Conclusions of Law 2 and Finding of Fact 2).

On the basis of its memorandum opinion and findings of fact and conclusions of law, the District Court on July 27, 1964 entered a preliminary injunction which restrained and enjoined the defendants from:

> 1. Transferring to any other person, firm or corporation any shares of the common stock of Maryland Casualty Company acquired by any of the defendants through the proposed exchange offer or otherwise, except pursuant to an order of this Court;
>
> 2. Merging or consolidating the Maryland Casualty Company or any of its subsidiaries or affiliates into or with American General Insurance Company, or any of its subsidiaries or affiliates, or with any other concern,

and from merging or commingling the assets of Maryland Casualty Company with those of American General Insurance Company, or of any of its subsidiaries or affiliates or with the assets of any other company;

3. Voting any or all of the common stock of Maryland Casualty Company acquired by the defendants or any of them by or through the proposed exchange offer or otherwise for the election of any persons as directors of Maryland Casualty Company except such persons as may be designated or recommended by the President and Chief Executive Officer of Maryland Casualty Company; and

4. Using or voting any stock of Maryland Casualty Company acquired by any of the defendants by or through the proposed exchange offer or otherwise to prevent or to interfere with Maryland Casualty Company entering into the life insurance business;

5. Using or voting any stock of Maryland Casualty Company acquired by any of the defendants by or through the proposed exchange offer or otherwise to change or interfere with the operations, practices, policies, customs, field and agency personnel and home office personnel of Maryland Casualty Company.

### II. The Parties and the Nature of Their Operations.

Maryland and its subsidiary and affiliated companies of The Maryland Group have for many years been engaged in the business of writing all lines of fire and casualty insurance, including fire, casualty, surety, fidelity, accident and sickness (Tr. 30). One or more members of The Maryland Group are licensed to do business and are doing business in all of the states of the Union and in the District of Columbia (Tr. 32). Members of The Maryland Group collectively have more than 17,000 agents in the United States who are engaged in writing fire and casualty insurance (Pl. Ex. 29). These agents are independent contractors

who write fire and casualty insurance for both Maryland and other fire and casualty companies. Some of these agents are also engaged in the writing of life insurance (Tr. 118, 284-285, 290).

No company in The Maryland Group has ever engaged in the life insurance business (Tr. 30). In March 1962 Maryland made a survey of its agents for the purpose of determining the amount of life insurance written by the agents, and whether, if Maryland should go into the life insurance business, it could expect to get a part of that life insurance business (Tr. 33-34, 284-285). In July 1962 Maryland incorporated a company called Life Insurance Company of Maryland, Inc. with a view to entering the life insurance business. No further steps were taken with respect to this company until April 7, 1964 when the board of directors of Maryland voted to subscribe for stock of the company in the amount of two and one-half million dollars. This company has not engaged in the life insurance business (Tr. 34, 60-61, 182-183; Pl. Ex. 8).

The American Group is engaged in writing both fire and casualty and life insurance (Tr. 374). American General itself is engaged either directly or indirectly through its subsidiaries in writing all lines of fire and casualty insurance (Tr. 374-375). It and its subsidiaries are qualified to write fire and casualty insurance in 21 states and the District of Columbia (Pl. Ex. 11A, p. 2).

American General has approximately 1100 agents who sell fire and casualty insurance for it in the states in which it is authorized to operate (Pl. Ex. 11A, p. 13). These agents, like the fire and casualty agents of Maryland, are independent contractors who represent more than one fire and casualty insurance company. Some of these agents also sell life insurance (Tr. 380-382).

The American Life Companies are engaged in writing life insurance and also accident and sickness insurance

(Tr. 375, 390).[3] The American Life Companies are qualified to write insurance in an aggregate of 42 states and the District of Columbia (Pl. Ex. 11A, p. 2). The American Life Companies, in common with most life insurance companies, market life insurance through two different sales forces. One sales force consists of life insurance salesmen who by custom and often by contract represent only one life insurance company and give substantially all of their business to that company.[4] The other way in which the American Life Companies market life insurance is through fire and casualty agents who are independent contractors and who customarily represent more than one life insurance company (Tr. 379-380).

### III. The Exchange Offer.

The evidence offered in the court below disclosed the following facts with respect to the origin and terms of the proposed Offer of Exchange by American General.

In 1963 Maryland acquired the stock of the Northern Insurance Company of New York which was engaged in the business of writing fire and casualty insurance. William Middendorf, a member of the firm of Middendorf, Colgate & Co. of New York, had acted as a financial adviser to Maryland in connection with the acquisition of this stock and had received a commission for his services. At the conclusion of the acquisition, Mr. Glibert, Executive Vice President of Maryland, told Mr. Middendorf that Maryland might be interested in considering affiliation with a good life insurance company if one came to Middendorf's attention. Pursuant to that suggestion Middendorf met with Maryland executives in the middle of November 1963 and gave them certain information concerning American General and made suggestions with

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[3] American General also sells accident and sickness insurance (Tr. 392).

[4] In two states this sales force includes certain full time paid employees of The American Life Companies who are called "debit men" (Tr. 379-380).

respect to a possible basis for an affiliation between the two groups (Tr. 36-37, 39-41, 185, 201-202).

Mr. Middendorf arranged a meeting on November 19, 1963 between the executives of the two groups and thereafter on December 5, Mr. Miller, the President and Chief Executive Officer of Maryland, and Mr. Glibert went to Houston to continue negotiations with the executives of American General. On January 14, 1964, Mr. Wortham, acting on behalf of American General, made a formal offer for an exchange of stock and this offer was submitted by Mr. Miller to the executive committee and then to the board of directors of Maryland on February 4, 1964. As a result the board of directors of Maryland appointed a committee to study the proposal and to negotiate further with American General. The board of directors of American General also appointed a committee to continue negotiations. The Maryland committee arranged a meeting in Washington on March 9, 1964, and at that time Maryland submitted to American General a counter proposal for an affiliation between the two groups.[5] The representatives of American General present at the meeting stated that the proposed terms were not satisfactory to American General. On the same day both companies issued press releases stating that the discussions had terminated (Tr. 41-45, 49-51, 56-60; Pl. Ex. 6, Def. Ex. 3).

On March 31, 1964, Mr. Miller addressed a letter to American General which stated, among other things, that any formal offer for an exchange of stock would have to be made by American General to Maryland's individual stockholders (Def. Ex. 3, p. 9, exhibit 8).

Thereafter, American General determined to make an Offer of Exchange directly to the individual stockholders

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[5] The proposal contemplated affiliation between the two groups through a Maryland holding company. The proposal also contemplated that the value of the shares to be received by Maryland stockholders would be increased from approximately $71.00 per share which was the basis of American General's prior offer to approximately $97.50 (Def. Ex. 3, pp. 7-8).

of Maryland (Def. Ex. 3, p. 10). The provisions of the Securities Act of 1933 required that a registration statement be filed with respect to this offer. Accordingly, American General filed such a registration statement with the Securities and Exchange Commission on May 20, 1964 (Def. Ex. 3, p. 11). The staff of the Securities and Exchange Commission after reviewing the registration statement and considering, among other things, objections made to it by Maryland found the statement deficient in certain respects. Accordingly, on July 6, 1964, American General filed an amended registration statement in accordance with a deficiency statement theretofore served upon it by the Securities and Exchange Commission (Pl. Ex. 11A & B; Def. Ex. 3, pp. 13-14). Thereafter, the staff of the Securities and Exchange Commission informed American General that the registration statement as amended was satisfactory and it was anticipated that the statement would become effective on July 9, 1964 (Def. Ex. 3, p. 14). Prior to this date, however, the District Court entered the temporary restraining order referred to above and American General requested the Securities and Exchange Commission to defer the effective date of the registration statement until after the hearing on Maryland's motion for a preliminary injunction (Def. Ex. 3, p. 14).

Prior to the filing of the registration statements American General entered into an arrangement with Lehman Brothers, a New York investment banking firm, to form and manage a group of securities dealers to solicit tenders of the common stock of Maryland pursuant to the Offer of Exchange (Pl. Ex. 11A, p. 1). Under the provisions of the Securities Act of 1933, Lehman Brothers and these other securities dealers could not solicit tenders of the stock of Maryland prior to the date upon which the registration statement became effective.

The Offer of Exchange was an offer to exchange shares of convertible preferred stock of American General with

an annual dividend rate of $1.80 and shares of the common stock of American General for shares of Maryland at the rate of one share of American General preferred stock and one-third of a share of American General common stock for each share of Maryland's common stock tendered. The other terms and conditions of the exchange offer were set forth in the prospectus filed with the Securities and Exchange Commission. The registration statement as amended stated that the exchange offer would expire at the close of business on August 10, 1964 or on such later date as might be designated by American General as provided for in the offer (Pl. Ex. 11A, p. 1).

On May 25, 1964, the plaintiff sent a letter to its stockholders advising them not to accept the proposed Offer of Exchange and expressing the opinion that the offer was inadequate to protect the stockholders' interests and also stating that Maryland would use every available legal means to oppose the proposed offer (Pl. Ex. 14). In an additional letter addressed to its stockholders dated June 10, 1964, Maryland discussed in greater detail the proposed offer and the reasons for its opposition to the offer and stated, among other things, that it was the considered opinion of the directors of Maryland that it was not a fair offer and that no Maryland stockholder should tender his shares for exchange (Pl. Ex. 13, Sheet 2).

The temporary restraining order entered by the District Court on July 9, 1964, included a provision enjoining the defendants "from soliciting, contacting or communicating with other shareholders in plaintiff for the purpose of acquiring additional stock in plaintiff or otherwise". American General believed that because of this provision it was obliged to refrain from public discussion of the merits of the exchange offer and from making any representations to the stockholders of Maryland with respect to the exchange offer.

## SUMMARY OF ARGUMENT

### I

The District Court granted Maryland extensive injunctive relief which prohibits American General from exercising any control over Maryland or from interfering with its personnel, practices or policies pending a final determination on the merits. The narrow issue presented on this appeal is whether this decision should be reversed because the District Court did not include in the preliminary injunction provisions prohibiting American General from proceeding with the exchange offer and thereby acquiring title to shares of Maryland stock. To prevail on this issue, Maryland must show that the District Court committed clear error or an abuse of discretion in framing the preliminary injunctive relief granted. *Young* v. *Motion Picture Association of America, Inc.*, 112 U.S. App. D.C. 35, 299 F.2d 119, *cert. denied*, 370 U.S. 922 (1962). The District Court framed the preliminary injunction after a full hearing in which the parties were given an unrestricted opportunity to present evidence and oral testimony was taken from a number of witnesess on disputed issues of fact. The District Court did not commit clear error or abuse its discretion by refusing to grant Maryland all of the injunctive relief it sought. The preliminary relief granted amply protects Maryland against any possible irreparable injury disclosed by the evidence. The granting of the relief sought by Maryland would have inflicted irreparable injury upon American General and would have had the effect of finally disposing of the case on the merits.

### II

Maryland has made no showing that it will suffer immediate irreparable injury if its stock is acquired and held by American General subject to the terms of the preliminary injunction. The preliminary injunction protects Maryland against any injury that might possibly arise from a merger of the two companies, from the ex-

ercise of control by American General, from any change in Maryland's management, or from any change in its personnel, policies or practices. Any irreparable injury that might conceivably follow from any of these events is therefore irrelevant. Alleged irreparable injury that might conceivably follow from uncertainties that must necessarily continue until a final decision is also irrelevant because those uncertainties cannot be removed by any preliminary injunction that may properly be granted. It is not the function of a preliminary injunction to make a final determination on the merits.

The evidence offered by Maryland with respect to the alleged disruptions of its relations with its agents rests on the assumption that during the pendency of this litigation there will be a merger of the two companies, American General will exercise control over Maryland, and will change its management, personnel, practices and policies. Under the preliminary injunction issued by the District Court those events cannot take place.

There is no substance in Maryland's contention that the injunction granted by the court below does not effectively protect it against interference with its plans for going into the life insurance business. The injunction specifically enjoins American General from using or voting any stock acquired through the exchange offer to prevent or in any way to interfere with Maryland's plans for entering the life insurance business. Maryland's own evidence with respect to the alleged difficulties it has met in attempting to recruit personnel for its proposed life insurance business shows that those difficulties could not be prevented by any preliminary injunction that could properly be granted because they result from uncertainties that will necessarily continue until there has been a final determination on the merits.

There is likewise no merit in Maryland's contention that if, after a trial on the merits, the District Court should order American General to divest itself of Maryland stock Maryland, its stockholders, and the stockholders of American General would be irreparably injured. This alleged

irreparable injury is not "immediate" within the meaning of Section 16 of the Clayton Act (15 U.S.C. 26); it rests on speculation as to an event that may never occur and that in any case cannot occur until years hence. In any event Maryland's argument is not supported by the evidence and improperly assumes that if the District Court should at some time in the future order divestiture it would do so on terms and conditions that would depress the market value of Maryland stock.

## III

The injunctive relief sought by Maryland would inflict irreparable injury upon American General and would finally determine the case on the merits. The exchange offer could not be left open pending a final determination of this case and a preliminary injunction restraining its consummation would mean that the offer would have to be withdrawn. The exchange offer involves securities worth between 225 and 250 million dollars and because of possible changes in economic conditions and in the market prices of the stocks involved it would not be feasible to keep the offer open. The preliminary injunction sought by Maryland would therefore finally determine this case in advance of a trial on the merits. The courts have often held that a preliminary injunction that has this effect should not be granted.

American General has incurred expenses in the amount of approximately $485,000 in connection with the preparation of the registration statement filed with the Securities and Exchange Commission to cover the exchange offer. If the exchange offer should be permanently frustrated by a preliminary injunction, American General would be irreparably injured by losing the total amount of these expenses and by being deprived of the advantages of affiliation with Maryland. If the exchange offer is frustrated the stockholders of Maryland will also suffer substantial irreparable injury because they will be deprived of the opportunity to exchange their stock for stock of American General at extremely advantageous terms.

IV

Maryland has failed to make the requisite showing in support of the merits of its alleged cause of action under the antitrust laws. Maryland has not shown that there is either a reasonable probability or a reasonable certainty that it will ultimately prevail upon the merits. To sustain its alleged cause of action under Section 7 of the Clayton Act and Section 1 of the Sherman Act Maryland must show that the acquisition of control by American General may substantially lessen competition. Under applicable decisions of the Supreme Court this question is to be determined on the basis of the market percentage or share of the two companies, their relative size or rank in relation to their competitors, and the structure of, and competitive conditions in, the industry. The evidence relating to these matters affirmatively shows that the acquisition of control of Maryland by American General will not substantially lessen competition. Maryland has cited no decision by the Supreme Court or any lower federal court holding an acquisition or merger unlawful in circumstances that even remotely resemble those in the instant case.

## ARGUMENT

### I. TO PREVAIL MARYLAND MUST SHOW THAT THE DISTRICT COURT COMMITTED CLEAR ERROR OR AN ABUSE OF DISCRETION BY REFUSING TO INCLUDE IN THE PRELIMINARY INJUNCTION A PROVISION PROHIBITING AMERICAN GENERAL FROM GOING FORWARD WITH THE EXCHANGE OFFER

This Court has held that a denial of a preliminary injunction will not be set aside on appeal unless the District Court's action was a clear error or an abuse of discretion. *Young* v. *Motion Picture Association of America, Inc.*, 112 U.S. App. D.C. 35, 299 F.2d 119, *cert. denied*, 370 U.S. 922 (1962); *Cox* v. *Democratic Central Committee*, 91 U.S. App. D.C. 416, 200 F.2d 365 (1952).[6]

[6] In appellant's reply memorandum submitted in support of its motion in this Court for a temporary restraining order it conceded the existence and application of this general rule (p. 3).

In the instant case the District Court granted Maryland extensive preliminary injunctive relief. That relief prohibits American General from exercising any control over Maryland and from interfering with its personnel, practices or policies pending a final determination on the merits. Under the preliminary injunction any stock of Maryland acquired by American General through the exchange offer or otherwise must be held by it pending the final determination of the case and will be subject to the plenary power of the court to order divestiture in the event that the court should determine that the effects of the acquisition of the stock would be unlawful.

The narrow issue presented on this appeal is whether the decision below should be reversed because the District Court did not include in the preliminary injunction provisions prohibiting American General from proceeding with the exchange offer and thereby acquiring title to shares of Maryland stock. Thus the issue is not whether Maryland should be denied all injunctive relief but whether the District Court committed clear error or an abuse of discretion in determining the extent and nature of the preliminary relief that should be granted. Questions as to the extent and nature of injunctive relief that should be granted *pendente lite* are peculiarly questions that fall within the discretion of the trial court. They are also questions which turn upon a careful appraisal of the particular facts involved. In the instant case there was a full hearing on the facts before the District Court. The parties had an unrestricted opportunity to present evidence. In addition to documentary evidence oral testimony was taken from a number of witnesses on disputed issues of fact. The District Court after due deliberation made detailed findings of fact in support of its conclusions of law and its memorandum opinion.[7] In these circumstances we submit that Mary-

[7] In the hearing before this Court on Maryland's motion for a temporary restraining order, it attacked the findings of the District Court on the ground that they represented an uncritical acceptance of the findings proposed by

land cannot discharge the burden imposed upon it by the general rule that has been stated above.

We submit that for reasons that will be set forth in detail below the District Court did not commit error or abuse its discretion by refusing to include in the injunction a provision that would have prevented American General from proceeding with the exchange offer and thereby acquiring title to shares of Maryland stock. The injunctive relief granted by the District Court amply protects Maryland against any possible irreparable injury disclosed by the evidence and the granting of the relief prayed for by Maryland would have inflicted irreparable injury upon American General and, in effect, would have finally disposed of the case in advance of a trial on the merits.

## II. MARYLAND HAS MADE NO SHOWING THAT IT WILL SUFFER IMMEDIATE IRREPARABLE INJURY IF ITS STOCK IS ACQUIRED AND HELD BY AMERICAN GENERAL SUBJECT TO THE TERMS OF THE PRELIMINARY INJUNCTION

To succeed in its prayer for a preliminary injunction under Section 16 of the Clayton Act (15 U.S.C. 26) Maryland was explicitly required by the statute to make "a showing that the danger of irreparable loss or damage is immediate". This section, which governs pleas for injunctive relief in private antitrust suits, has been consistently applied in accordance with its terms by the courts. Thus where the plaintiff fails to show an immediate danger of irreparable loss or damage its prayer for a preliminary injunction is denied. *Young* v. *Motion Picture Association*

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American General. This attack is unjustified. The District Court adopted a number of findings proposed by Maryland and rejected some findings proposed by American General. In its findings of fact and conclusions of law the District Court rejected the contentions of American General on the crucial jurisdictional question of the application of the McCarran Act. A number of the findings proposed by American General and adopted by the District Court, *i.e.*, those relating to lines of commerce and relevant markets (Findings of Fact 8-19) are not subject to criticism or attack because Maryland proposed no comparable findings and presented no evidence whatsoever to contradict the findings proposed by American General.

*of America, Inc.*, 112 U.S. App. D. C. 35, 37, 299 F.2d 119,[a] *cert. denied*, 370 U.S. 922 (1962); *H. E. Fletcher Co.* v. *Rock of Ages Corp.*, 326 F.2d 13, 16-17 (2d Cir. 1963); *Deltown Foods, Inc.* v. *Tropicana Products, Inc.*, 219 F. Supp. 887, 889 (S.D.N.Y. 1963); *Fein* v. *Security Banknote Co.*, 157 F. Supp. 146, 148 (S.D.N.Y. 1957).

The mere showing of acts in violation of the antitrust laws on the part of the defendant gives a private plaintiff no standing to obtain injunctive relief. Section 16 makes it clear that the private plaintiff's standing depends on a showing of threatened loss or injury to him personally which would have entitled him to injunctive relief under standard equitable principles. The authority to seek injunctive relief to vindicate the public interest by enforcing the antitrust laws is vested exclusively in the Attorney General of the United States and his subordinates (Clayton Act, § 15, 15 U.S.C. 25). See *United States* v. *Borden Co.*, 347 U.S. 514, 518; *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653, 657 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); *Beegle* v. *Thomson*, 138 F.2d 875, 881 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944); *Jack* v. *Armour & Co.*, 291 Fed. 741, 745 (8th Cir. 1923). It is to be noted that in the instant case the Attorney General has not chosen to institute proceedings to prevent American General's acquisition of control of Maryland even though the proposed acquisition has been widely publicized and, as the record shows, counsel for Maryland has on three occasions called the proposed acquisition to the attention of the Antitrust Division of the Department of Justice (Tr. 253-256).

In considering the issue of irreparable injury it is important to bear in mind the scope of that issue as it is presented on this appeal. The preliminary injunction granted by the District Court protects Maryland against

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[a] In *Young* this Court affirmed an order of the District Court denying a motion for a preliminary injunction which was based on the ground, among others, that "the plaintiffs have failed to establish irreparable injury which would justify the relief requested".

any injury that might possibly arise from (1) the merger or consolidation of Maryland with American General, (2) the merger or commingling of the assets of Maryland with those of American General, (3) the voting of any common stock of Maryland acquired by American General for the election of any persons as directors of Maryland except such persons as may be designated or recommended by the present management of Maryland, (4) the using or voting by American General of any stock of Maryland to prevent or interfere with Maryland entering into the life insurance business, (5) the using or voting of any stock of Maryland to change or interfere with the operations, practices, policies, customs, field and agency personnel, and home office personnel of Maryland. It follows that any alleged irreparable injury which could or might be inflicted by any of these prohibited acts is irrelevant on this appeal because Maryland is now protected against injury of that kind.

On the other hand, it is important to note that any alleged irreparable injury that might follow from uncertainty as to whether it will ultimately be determined that American General may lawfully acquire stock of Maryland is also irrelevant. This uncertainty will continue until a final determination on the merits and it is not the function of a preliminary injunction to make that determination.

The question therefore is whether Maryland has presented any evidence that justifies the conclusion that it is threatened with irreparable injury simply because under the order of the District Court American General will be allowed to acquire title to shares of stock in Maryland and to hold those shares subject to the provisions of the preliminary injunction until a final determination on the merits. Irreparable injury that could conceivably be threatened by reason of acts that are enjoined by the District Court or that might be the result of the irreducible uncertainty that must continue until there has been a final

determination on the merits provides no basis for an attack on the judgment of the court below.

In the following pages, we shall consider the evidence relating to the several categories of irreparable injury asserted by Maryland. We submit that this analysis shows that the evidence, measured by the standard set forth above, does not justify reversal or modification of the decision below. Far from committing clear error or abusing its discretion the District Court was clearly correct when it found that the preliminary injunction granted will fully protect Maryland against any possible irreparable injury (Finding of Fact 35; Conclusion of Law 4).

Before discussing the evidence in detail there is one general comment with respect to the bulk of that evidence that may pertinently be made. The record in this case shows beyond dispute that for several months prior to the time when American General announced its intention of making the exchange offer to the stockholders of Maryland the managements of the two companies were negotiating with respect to the possible merger or affiliation of American General and Maryland (Tr. 39-60; Def. Ex. 3). During these negotiations Maryland itself made a proposal for the affiliation of the two groups (Tr. 58, 162-163). These facts cast grave doubt upon Maryland's assertions as to irreparable injury.[9] It is no answer for Maryland to say that the negotiations contemplated a different form of affiliation or relationship than would exist if the exchange offer should be consummated. The evidence shows that whatever form of affiliation was contemplated it was to be publicly known, was to be accomplished by some form of stock relationship and common management, and that some degree of

[9] Although one of Maryland's witnesses testified that concern "about the agency situation" was one of the reasons that the management of Maryland was reluctant to become affiliated with American General (Tr. 44), the fact that a committee of the board of directors of Maryland made a counter proposal of its own for the affiliation of the two groups is decisive evidence that the management of Maryland did not regard this a controlling consideration.

unified operation would have resulted. (See, *e.g.*, Def. Ex. 3, pp. 4-8.)[10] In these circumstances the District Court was fully justified in concluding in its memorandum opinion that it was unlikely that the officers of Maryland "would have participated in such negotiations and, indeed, made their own proposal of terms if, in fact, the stock acquisition by defendants would cause the damage to plaintiff such as the officers now say would result" (Memorandum Opinion, Par. 3).

We shall now consider the evidence relating to the question of irreparable injury classified according to the different subjects to which the evidence related.

### A. The Evidence Relating to the Alleged Disruption of Maryland's Relations With Its Agents

The bulk of the evidence offered by Maryland on the issue of irreparable injury was designed to establish that unless it was given preliminary injunctive relief its relations with its fire and casualty agents would be impaired and that many of its more important agents might sever their relations with the company. This evidence included oral testimony from four fire and casualty agents and from the executives of Maryland and also an affidavit setting forth excerpts from letters written by agents in response to a letter from Maryland soliciting their views with respect to American General's exchange offer.

This evidence provides no basis for Maryland's present attack on the order of the District Court. The evidence rests on the assumption, sometimes explicit and sometimes tacit, that American General would "take over" Maryland and exercise control over its operations and particularly

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[10] Maryland may assert that in participating in these negotiations it did not contemplate a "take over" or control of Maryland by American General. If this assertion means that the irreparable injury feared by Maryland would result from a "take over" or the exercise of control by American General it does not advance Maryland's argument since the preliminary injunction protects Maryland against any irreparable injury that might be caused by a "take over" or by the exercise of control.

that American General would use any stock it acquired to change Maryland's corporate identity, its personnel and its practices and policies in dealing with its agents. This is in fact the assumption that underlies Maryland's allegations of irreparable injury in Paragraph 24 of its complaint which are based upon the premise "If control of the plaintiff by the defendant, American General, becomes effective" and upon the "acquisition of control". The preliminary injunction issued by the District Court removes any basis for this assumption.

That the asserted fears of the agents proceed from apprehensions that American General would "take over" and control Maryland and change its identity, personnel and particularly its practices and policies in dealing with agents is patent from the oral testimony offered by Maryland. Three of the agents who were called as witnesses by Maryland admitted in substance on cross examination that their apprehensions would be substantially removed and that they would continue to act as agents for Maryland if they could be sure that its identity, personnel and practices and policies would not be changed (Tr. 88-89, 102-105, 111). A fourth agent witness when asked whether if American General should become affiliated with Maryland and there should be no change in the practices and policies of Maryland his fears would continue replied "I can't answer that" (Tr. 217). A fifth agent witness did not testify that the acquisition of stock in Maryland by American General would impair Maryland's relations with its agents but confined his testimony to the question whether the acquisition would affect the placing of life insurance by those agents. His testimony therefore has no relevance on the issue of irreparable injury (Tr. 217-225). In short, the testimony of the agent witnesses did not establish that the bare acquisition by American General of title to Maryland stock in itself would affect their relations with Maryland but rather that what they feared were changes in the identity, personnel, practices and policies of Maryland—changes which cannot occur under the terms of the preliminary injunction.

In the course of the direct examination of two of the agent witnesses counsel for Maryland attempted to create the impression that if American General should become affiliated with Maryland, American General by the use of "pressure" would "force" the fire and casualty agents of Maryland to divert life insurance business from other companies to American General and that this would be done by refusing to accept fire and casualty risks unless the agent gave American General its life insurance business. (See, *e.g.*, Tr. 205-206, 220.) These witnesses admitted on cross examination that they had never personally had any dealings with The American Group and that they knew of no instance in which The American Group had engaged in practices of that kind (Tr. 211-212, 221-222). Maryland presented no evidence whatsoever that any company in The American Group had ever engaged in such practices of this kind. Mr. Woodson, the Vice President of American General and President of two of The American Life Companies, testified that it was not the practice of the companies in The American Group to tie the acceptance of fire and casualty risks to life insurance business in any way (Tr. 382).[11] He also testified that when those

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[11] Mr. Woodson testified that in fact it would not be possible for The American Group to engage in such practices: "I am quite sure that they don't tell him that, and I am quite sure that it would be useless to tell him that. He is a completely independent businessman, sir, and his answer would be: go fly a kite." (Tr. 382). Earlier in his testimony Mr. Woodson had stated that the fire and casualty agent is a completely independent businessman who places his insurance where he chooses. "He buys it to his best advantage and in his view to the best advantage of his clients" (Tr. 381).

The record shows that the representatives of The American Life Companies who solicit life insurance from fire and casualty agents are not the same representatives who deal with its agents on behalf of American General with respect to fire and casualty business. Mr. Wortham testified that the life insurance business is not handled by fire and casualty representatives but "is handled by life insurance special agents who know the life insurance business, and those life insurance agents do not deal with our agents with reference, or with regard to fire and casualty business. It is separate, handled entirely separately." (Tr. 550-551).

companies solicited life insurance business from fire and casualty agents they did not put "pressure" on them to get that business (Tr. 383). There is therefore in the record no credible basis in fact for any assertion that The American Group had engaged or would or could engage in the practices that the two agent witnesses professed to fear.[12]

In any case the assertion is not only false in fact but irrelevant as well in view of the provisions of the preliminary injunction issued by the District Court. That injunction effectively prevents American General from changing or interfering with the operations, practices, policies and customs of the field and agency personnel of Maryland and thus effectively protects both Maryland and its agents against these wholly hypothetical apprehensions.

In addition to the oral testimony of five agents, Maryland introduced in evidence an affidavit of A. R. Fredericks, its assistant general counsel, which contained excerpts from letters received from a substantial number of agents commenting on American General's exchange offer (Pl. Ex. 20, exhibit c). These excerpts provide no support for Maryland's contention that the preliminary injunction entered by the District Court fails to protect it against possible irreparable injury. The opinions expressed in the excerpts are not directed to the situation that exists under the preliminary injunction but are based on the assumption that American General would "take over" Maryland, that

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12 The plaintiff's own evidence shows that it would not be possible for American General to engage in coercive practices in dealing with fire and casualty agents. That evidence established that fire and casualty agents are in a position to place their business with any one of a large number of competing companies. Mr. Peterson, the Executive Vice President of Maryland, characterized the competition among insurance companies for agents as "tough" (Tr. 302). The President of Maryland testified that it was easy for competitors to divert agents from Maryland (Tr. 118).

a merger of the two companies would be consummated, and that American General would exercise control over Maryland and that there would be changes in its personnel, practices and policies. The validity of this characterization of the excerpts is supported by a consideration of the circumstances in which they were written, by Maryland's own characterization of the excerpts, and by the text of the excerpts themselves.

The views expressed in the excerpts were elicited by a letter that the president of Maryland sent to all of its agents on June 11, 1964, slightly less than a month before the filing of the complaint herein (Pl. Ex. 13). That letter enclosed a copy of a letter dated June 10, 1964 which the president of Maryland had addressed to the stockholders of the company advising them not to accept American General's exchange offer (Pl. Ex. 13, Sheet 2). The letter of June 10 attached a two page statement of twelve reasons why the stockholders should reject the exchange offer (Pl. Ex. 13, Sheets 3-4). The third paragraph of the letter to the stockholders dated June 10, 1964 characterized the proposed exchange offer as involving a "take over" of Maryland. The same characterization was used in the third and fourth numbered paragraphs of the two page statement attached to the letter. The agents who received these enclosures were therefore invited to assume, and as their replies show, they did assume, that they were being asked to comment on the situation that would ensue if there were a "take over", if the two companies were merged, and if American General exercised control over the policies and practices of Maryland.

In his affidavit, Mr. Fredericks characterizes these excerpts in terms that leave no doubt that they were written on this assumption. Thus, in paragraph 7 of his affidavit, Mr. Fredericks states: "That excerpts from a sampling of said letters contain statements on the part of agents and brokers that, *if control of Maryland Casualty Company by American General Insurance Company becomes effective,*

the agency relationship WILL be terminated • • •". (Emphasis supplied.) Similarly, in paragraph 8 of the affidavit, Mr. Fredericks states: "That excerpts from a sampling of said letters contain statements on the part of agents and brokers that, *if control of Maryland Casualty Company by American General Insurance Company becomes effective,* the agency relationships MAY be terminated • • •". (Emphasis supplied.) And in paragraph 11 of his affidavit, Mr. Fredericks states: "That excerpts from a sampling of said letters contain statements on the part of agents and brokers that *control* of Maryland Casualty Company by American General Insurance Company will jeopardize existing relationships • • •". (Emphasis supplied.)

The words of the excerpts themselves leave no doubt that Mr. Fredericks was correct in stating the assumption on which the letters were written. A minute analysis of these excerpts would unduly prolong this brief but we earnestly invite the Court's attention to the words of the excerpts because those words clearly disclose the nature of the assumption that underlies the opinions expressed. The excerpts abound in references to "take over" and to "control" of Maryland by American General. They contain such phrases as "in the event the proposed merger is completed", "if this merger takes place", "if this merger is consummated", "should a merger occur", and "if this proposed merger becomes a reality". One theme that is reiterated in the excerpts is the fear of changes in the personnel, practices and policies of Maryland. The following phrases among others reflect this theme: "a change in company operating philosophy"; "drastic revision in operating personnel and procedure"; "we are concerned whether or not the same situation would prevail under new management"; "any management change"; "change in Maryland policy"; "it is my deep fear that should the proposed merger be effected the management of Maryland Casualty and its policies would be changed";

"changes in the management and control"; "should management of Maryland change"; "possible change in the company's underwriting policy"; "change in top management"; "change in control"; "change of management"; "I hate to see management change".

Thus the excerpts, like the oral testimony of the agents, are directed to a state of affairs that will not and cannot exist under the preliminary injunction issued by the District Court. That injunction prohibits the very things that the excerpts indicate might disturb Maryland's relations with its agents. Far from supporting the plaintiff's argument, the excerpts provide powerful support for the finding of the District Court that the injunctive relief granted will effectively protect Maryland against any possible irreparable injury.

The testimony of the executives of Maryland added no substance to the oral testimony of the agents or to the excerpts but is in fact subject to the same infirmities. C. H. Peterson, Executive Vice President of Maryland, admitted on cross examination that his direct testimony with respect to possible impairment of Maryland's relationship with its agents, was based on the assumption that American would take over control of Maryland (Tr. 306-307, 311-312, 315-316) and would change the management and policies of Maryland (Tr. 307, 312, 314, 317-318). He admitted on cross examination that if the court should issue a preliminary injunction preventing any change in the policies or personnel of Maryland pending a final determination of the case "it would help the company" (Tr. 319).

Mr. Miller, President of Maryland, in testifying on direct examination about the asserted difficulties with the company's agents explained: "You are unsure of future company policies, of practices, of underwriting measures." (Tr. 95). And in a later passage in his direct testimony when referring to the letters received from agents, Mr.

Miller characterized the letters as stating: "that if the affiliation should take place, well, then they would have to look for other markets, or would look for other markets." (Tr. 114). These statements amount to a tacit recognition that it is not the mere acquisition of title to stock by American General that would be significant to the agents but any change in policies and practices that might follow from the actual merger of the two groups and the consequent actual exercise of control by American General. Mr. Miller, when asked on direct examination whether the interests of Maryland would be protected by a preliminary injunction that permitted the acquisition to proceed but prohibited American General from exercising any control over Maryland or its policies, merely replied in general terms: "I think the same general objections would continue for the simple reason that it is the uncertainty that causes the difficulty here" (Tr. 117). He did not explain why the uncertainty would not continue until there was a final determination on the merits. It is to be noted that Mr. Peterson admitted that the uncertainties caused by the exchange offer would continue "as long as this suit is going" (Tr. 320).

All of Maryland's evidence with respect to the alleged unrest among its agents should be appraised in the light of the oral testimony of W. A. Brook, President of Oregon Automobile Insurance Company. He testified that American General acquired all of the stock of his company in June 1963 (Tr. 447, 451). Since the acquisition Oregon has increased its premiums income about 15 percent (Tr. 454); it has lost no agents; and it has had no complaints from agents since the affiliation with American General (Tr. 455) and particularly no complaints that American General has exerted any pressure on the agents to give life insurance business to The American Life Companies (Tr. 459). There have been no changes in executive personnel of Oregon (Tr. 452) and no attempt to interfere with the management of the company (Tr. 452).

There is one final comment that needs to be made on the evidence offered by Maryland with respect to the opinions of its agents. As it has been explained at page 26, *supra*, when Maryland on June 11, 1964 solicited the views of its agents on the exchange offer it sent to them a copy of a two page document which had been distributed on the previous day to stockholders, stating twelve reasons why the stockholders should not accept the exchange offer (Pl. Ex. 13). One of the twelve reasons set forth in this document related to Maryland's agents and included in an underlined sentence the following assertion: "*There is no guarantee that this producing force would remain loyal to a Maryland Casualty Company taken over by the Texas company.*" (Pl. Ex. 13, Sheet 3). It is also to be noted that Maryland did not at any time inform its agents that in the registration statement filed with the Securities and Exchange Commission American General had stated that if the exchange offer should be consummated no change would be made in Maryland's name, identity, or home office location or in its management or customs, methods, home office personnel or field and agency personnel (Tr. 128). It was admitted by the president of Maryland that the company's resident agents in the field had talked to agents about the exchange offer (Tr. 126-127).[12] On the basis of these facts we submit that the District Court was fully justified in finding in its memorandum opinion that "while the plaintiff introduced evidence which it contends establishes a threatened disturbance in its relationship with its agents throughout the country, much of this evidence is the result of activities by the plaintiff following the breakdown of negotiations when the plaintiff by communications to its stockholders and agents undertook an active campaign of resistance against the proposed stock acquisition by the defendants".

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[12] There is a certain choral quality in the opinions expressed in the excerpts from the letters of the agents which suggests that those opinions may not have been entirely spontaneous.

**B. The Evidence Relating to Alleged Interference With Maryland's Plans to Go Into the Life Insurance Business**

A part of Maryland's evidence was directed to the argument that it would suffer irreparable injury because it could not proceed with its plans to enter the life insurance business. This evidence is not germane to this appeal since the District Court specifically enjoined American General from using or voting any stock acquired through the exchange offer to prevent or in any way interfere with Maryland's plans for entering the life insurance business. This is all the relief that Maryland can legitimately seek in a plea for a preliminary injunction.

Maryland's evidence with respect to this category of alleged irreparable injury related to the difficulties it claims to have had in recruiting personnel for its proposed life insurance operation. Its own proof shows that these difficulties are bound to continue until there has been a final determination on the merits. Mr. Miller testified that they were having difficulties in getting first class personnel "for the simple reason no man will leave a company with which he has been connected for some time to come with another company with the chance that the management of that company will change or the chance that the policy will change, or any chance that he might not retain his position." (Tr. 113-114). These uncertainties will obviously continue until there has been a final determination on the merits. This point is emphasized by the testimony of Mr. Peterson about his alleged recruiting difficulties. Mr. Peterson testified that one prospect declined to consider the matter "until such time as the American General and Maryland situation was cleared up" (Tr. 289) and that another wrote "that he could see too much in the way of road blocks at this time" (Tr. 289). Mr. Peterson's own testimony was that he had concluded that "with this situation existing" it would be impossible to get "the type of man that we would want, the type of man who has a job and not looking for a job * * * " (Tr. 289-290). It is clear that the "situa-

tion existing" cannot be "cleared up" until there has been a final determination on the merits, and that nothing short of such a determination can remove Maryland's asserted difficulties. It is not the function of a preliminary injunction to determine the merits and Maryland is not entitled to such relief on this appeal.

### C. The Evidence With Respect to Alleged Irreparable Injury in the Event of Divestiture

Faced with American General's offer to accept a preliminary injunction that would prevent the exercise of control over or interference with management and operations, Maryland fell back on the argument that if the exchange offer should be consummated and divestiture should finally be ordered the divestiture would inflict irreparable injury upon Maryland, upon its stockholders and upon the stockholders of American General (Tr. 671).

There are three comments that may be made about this argument. In the first place the asserted irreparable injury is not "immediate" within the meaning of Section 16 of the Clayton Act. It depends upon speculation as to an event that may never occur and that in any case cannot occur until several years hence. In the second place the argument ignores both the fact that any stockholder of Maryland who voluntarily decides to exchange his stock would do so with full knowledge of the possibility of divestiture and the fact that American General is prepared to accept any risks to it and its stockholders that might result from proceeding with the exchange offer.

In the third place the argument has no foundation in fact. It rests upon one conclusory sentence in the affidavit of Winthrop C. Lenz, Senior Vice President of Merrill Lynch Pierce Fenner & Smith, Inc. (Pl. Ex. 26):

> "The uncertainties caused by such a large block of stock overhanging the market in the event of a gradual

> divestiture, or flooding the market in the event of a sudden divestiture, would act to depress the market price of Maryland stock, resulting in American General's being forced to sell Maryland stock at a price below that paid through the exchange offer."

Mr. Lenz's reference to "flooding" the market may be disposed of summarily. It is not the practice of the federal courts when they order divestiture of stock in antitrust cases to require the stock to be dumped on the market. In *United States* v. *Aluminum Co. of America*, 91 F. Supp. 333 (S.D. N.Y. 1950), the individual defendants involved were given 10 years within which to divest.[14] The same period of time was allowed in the case of *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 335. In *International Boxing Club* v. *United States*, 358 U.S. 242, 254, a five year period was allowed. It is unreasonable to assume that the District Court in this case would require divestiture on any terms that would result in a "flooding" of the market.

Mr. Lenz did not adduce in his affidavit any evidentiary detail to support his assertion that "a large block of stock overhanging the market in the event of a gradual divestiture" would depress the price below that paid through the exchange offer. Nor did Maryland come forward with any evidence to show that the stock divestitures ordered in the antitrust cases cited above or in other antitrust cases depressed the market value of the stocks involved either by reason of an "overhang" or otherwise.

Mr. Lenz's unsupported assertion was contradicted by American General's witness Stephen McKenzie duBrul, a member of the investment banking firm of Lehman Brothers of New York City, whose testimony was not presented in affidavit form but who appeared in person and was sub-

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[14] The relevant provisions of the judgment are summarized in The Federal Antitrust Laws with Summary of Cases Instituted by the United States, CCH, 1952, p. 177.

jected to cross examination (Tr. 495-500, 512-520). Mr. duBrul testified that in the case of divestiture the Maryland stock could be sold either by private placement or by a public offering made through an underwriting syndicate in an orderly way that would not depress the market price of the stock. He supported his testimony by reference to specific divestitures made in antitrust cases.[15] Mr. duBrul specifically testified that in the case of an orderly distribution of stock there was no reason for the "overhang" to cause a decline in the market price (Tr. 518-520).

On the basis of the record the District Court was fully justified in rejecting Maryland's contention that a future divestiture of Maryland stock would result in irreparable injury.

### D. The Authorities Cited by Maryland on the Issue of Irreparable Injury Are Not Pertinent

In the District Court Maryland cited certain decisions to support its argument that it would suffer irreparable injury if consummation of the exchange offer was not enjoined. Since the issue of irreparable injury turns upon the particular facts involved, decisions in other cases at most provide analogies rather than controlling precedents. The fact is, however, that the cases relied upon by Maryland do not support its contention in this Court. In two of the cases the preliminary injunction did not enjoin future acquisitions of stock by the defendant but merely enjoined the voting of stock. See *Briggs Mfg. Co.*, 185 F. Supp. 177 (E.D. Mich.), *aff'd, Crane Co.* v. *Briggs Mfg. Co.*, 280 F.2d 747 (6th Cir. 1960), and *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307, 317 (D. Conn.),

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[15] For example, Mr. duBrul testified that in Muskegon Piston Ring Co. v. Gulf & Western Industries, Inc., 328 F.2d 830 (6th Cir. 1964), Gulf & Western divested itself by private sale of its stock in the Muskegon company at a price substantially above the price at which the shares had been acquired (Tr. 496-497). He also discussed the divestiture of General Motors stock made pursuant to the court decree in United States v. E. I. duPont de Nemours & Co., 366 U.S. 316 (Tr. 500).

*aff'd*, 206 F.2d 738, 739 (2nd Cir. 1953). Indeed it is significant that in the *Crane* case the court's order contemplated that the defendant might thereafter acquire stock because it restrained the defendant from soliciting proxies and from voting any shares "now owned or hereafter acquired". 185 F. Supp. at p. 186. In the third case relied upon by Maryland, the preliminary injunction granted by the District Court in addition to restricting the right to vote also restrained future acquisitions by the defendant. *Muskegon Piston Ring Co.* v. *Gulf & Western Industries, Inc.*, 328 F.2d 830 (6th Cir. 1964). It is significant, however, that in that case the District Court expressed its willingness to consider an arrangement whereby the defendant could acquire additional stock provided it would place the stock in trust with the clerk of the court until a final determination on the merits, thus indicating that in the court's view the bare acquisition of title was of little consequence if the use of the stock to exercise control was precluded.[16]

These cases do not support Maryland's contention that the District Court committed clear error or abused its discretion by refusing to enjoin the exchange offer and confining the preliminary injunction to restraints that would prevent American General from exercising any control over or interfering with the operation of Maryland *pendente lite*. It is to be noted that in *United States* v. *Brown Shoe Co.*, 1956 Trade Cas. ¶ 68,244, p. 71,117 (E.D. Mo. 1956), the District Court dealt with the problem of preliminary relief in much the same way that it was dealt with here. There the court denied the Government's motion for a preliminary injunction to prevent the acquisition on the condition that the acquired property be kept separate and distinct and operated in such a way that it could, if

[16] The court's suggestion does not appear in any official report. It is set forth, however, in the transcript of a hearing before the District Court on January 2, 1964 and may be found on page 315a of the Appendix to Appellant's brief in the United States Court of Appeals for the Sixth Circuit.

necessary, be divested as an independent unit after a final determination on the merits. It should also be noted that in *United States* v. *General Telephone & Electronics Corp.*, an antitrust case brought in June 1964 in the United States District Court for the Southern District of New York, the Government by stipulation allowed General Telephone to consummate an acquisition of three telephone companies on condition that they be "separately maintained in a condition which would permit their disposition as going businesses • • • ". *Antitrust and Trade Regulation Report* No. 156, July 7, 1964, page A-5.

### III. THE INJUNCTIVE RELIEF SOUGHT BY MARYLAND WOULD INFLICT IRREPARABLE INJURY UPON AMERICAN GENERAL AND IN EFFECT WOULD FINALLY DETERMINE THIS CASE ON THE MERITS

G. S. Wortham, President of American General, testified that the exchange offer could not be left open pending the final determination of this case and that if a preliminary injunction should be granted restraining the consummation of the offer it would have to be withdrawn (Tr. 543).[17] Mr. Wortham pointed out that the exchange offer involved securities with a value of between 225 and 250 million dollars and that because of possible changes in economic conditions and in the market prices of the stocks involved it would not be "sound business judgment" to keep the offer open (Tr. 543-544). Maryland offered no evidence to contradict this testimony.[18]

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[17] Mr. Wortham testified that he had been advised by counsel that it would take approximately three years to reach a final determination. Taking into account appellate proceedings this was a conservative estimate (Tr. 543). In Brown Shoe Co. v. United States, 370 U.S. 294, six years elapsed between the denial of a preliminary injunction and the final decision of the case by the Supreme Court. This Court can take judicial notice of the fact that in AWR v. Ries & Co., 112 U.S. App. D.C. 49, 299 F.2d 133 (1962), an antitrust case tried in this district, the taking of evidence in the District Court consumed nine months.

[18] Mr. Wortham was not even cross examined on this point.

Maryland is therefore seeking preliminary injunctive relief that would in effect finally determine this case in advance of a trial on the merits. The courts have often held that a preliminary injunction that has this effect should not be granted. *W. A. Mack, Inc.* v. *General Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958); *United States* v. *Brown Shoe Co., Inc.*, 1956 Trade Cas. ¶ 68,244, p. 71,116 (E.D. Mo. 1956); *United States* v. *Standard Oil Co. (Ind.)*, 1961 Trade Cas. ¶ 70,131, p. 78,522 (N.D. Cal. 1961); *Anderson-Friberg, Inc.* v. *Justin R. Clary & Son, Inc.*, 98 F. Supp. 75, 82 (S.D.N.Y. 1951); *Lowe, et al.* v. *Consolidated Edison Co.*, 67 F. Supp. 287, 291 (S.D.N.Y. 1941).

Mr. Wortham testified that American General had incurred expenses in the amount of approximately $485,000 in connection with the preparation and filing of the registration statement with the Securities and Exchange Commission. If the exchange offer should be permanently frustrated by a preliminary injunction American General would be irreparably injured both because the total amount of the expenses heretofore incurred would be completely lost (Tr. 544-545) and because it would be deprived of the advantage of affiliation with Maryland. The courts have held that preliminary injunctive relief should be denied if it would inflict this kind of an irreparable injury on a defendant. *United States* v. *Standard Oil Co. (Ind.)*, *supra; United States* v. *FMC Corp.*, 218 F. Supp. 817, 823 (N.D. Cal. 1963), *app. dismissed for want of juris.*, 321 F.2d 534 (9th Cir. 1963), *application for preliminary injunction denied*, by Goldberg, J., in chambers, 11 L.Ed. 2d 20 (1963).

The evidence establishes that if as a result of a preliminary injunction the exchange offer lapses or has to be withdrawn the stockholders of Maryland will also suffer irreparable injury. Under the exchange offer one third of a share of common stock and one share of a new preferred stock of American General bearing a $1.80 dividend will be exchanged for each share of Maryland. The

record shows that the value of the American General stock received in the exchange will be between $70 and $71.[19] The amount of the loss that would be suffered by the stockholders of Maryland if the exchange offer should be frustrated may therefore be measured by the difference between $70 or $71 and the market value that the Maryland stock would have in those circumstances. Maryland's own witness, Mr. Lenz, expressed the opinion that the Maryland stock "should be entitled to sell at about $60 a share, assuming that the proposed exchange offer is not consummated" (Tr. 329). On this basis the total amount of the irreparable loss that would be inflicted upon Maryland stockholders would be approximately $33,000,000 (Tr. 727). On the other hand, American General produced evidence that in the absence of the exchange offer the market price of Maryland's stock would be approximately $50 per share (Tr. 484). On this basis the total irreparable loss that would be suffered by Maryland stockholders would be approximately $66,000,000 (Tr. 727-729). The trial judge in his findings of fact adopted the latter figure and was fully justified in doing so.[20] For present purposes it is unnecessary to resolve this conflict in the evidence because even on the basis of Maryland's own testimony the irreparable loss suffered by stockholders would be substantial.

In determining whether to grant a preliminary injunction that would deprive the stockholders of the advantages

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[19] There is an existing market for American General common stock. At the time of the hearing it was approximately $78 a share. One third of a share would therefore be worth $26 (Tr. 480). Since the preferred stock is a new stock there is no present market for it. Mr. duBrul of Lehman Brothers testified that it was his opinion based on the dividend rate of the preferred stock and its other incidents that the stock would sell at approximately $45 a share (Tr. 480-483). Mr. Wortham testified that in his opinion the preferred stock would sell at a price of $44 a share (Tr. 549). Maryland introduced no evidence contradicting this testimony.

[20] American General's contention as to the value of Maryland stock was based on evidence of actual market prices before the price was increased by information and rumors about the exchange offer (Tr. 485).

of the exchange offer the District Court was entitled to take into account this substantial irreparable injury that would be inflicted upon those stockholders by such an injunction. See *United States* v. *Gimbel Brothers, Inc.*, 202 F. Supp. 779, 780 (E.D. Wis. 1962); *United States* v. *FMC Corp., supra* at p. 823; *United States* v. *Standard Oil Co. (Ind.)*, 1961 Trade Cas. ¶ 70,131, p. 78,522 (N.D. Cal. 1961).

## IV. MARYLAND HAS FAILED TO MAKE THE REQUISITE SHOWING ON THE MERITS OF ITS ALLEGED CAUSE OF ACTION

To justify its prayer for preliminary injunctive relief Maryland was required to make a substantial showing in support of its alleged cause of action under the antitrust laws. It is immaterial whether this burden is stated in terms of a "reasonable probability" or in terms of a "reasonable certainty" that Maryland will ultimately prevail on the merits.[21] Maryland has failed to meet either test; the District Court so held and no support for a contrary holding could have been found in the record.

Maryland's cause of action under the antitrust laws requires a showing that the effect of the acquisition of control of Maryland by American General may be substantially to lessen competition.[22] The Supreme Court has laid down the factors that are decisive in determining whether an acquisition or merger will substantially lessen competition. The first and most important factor is the market position of the companies involved stated in terms

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[21] The courts have stated the test in both ways. See Young v. Motion Picture Association of America, Inc., 112 U.S. App. D.C. 35, 37, 299 F.2d 119, 121, *cert. denied*, 370 U.S. 922 (1962); H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2d Cir. 1963); Perry v. Perry, 88 U.S. App. D.C. 337, 338, 190 F. 2d 601, 602 (1951).

[22] This is true under both Section 1 of the Sherman Act and Section 7 of the Clayton Act. See United States v. Philadelphia National Bank, 374 U.S. 321 and United States v. First National Bank, 376 U.S. 665; United States v. Crocker-Anglo National Bank, 223 F. Supp. 849, 859-860 (N.D. Cal. 1963).

of their percentage of the relevant market.[23] This factor is not considered, however, in isolation but should be appraised in light of the size or rank of the companies in relation to their competitors and in light of the structure of the particular industry involved; *e.g.*, whether it is marked by a high degree of concentration or competition and whether there is ease of entry.[24]

The application of these tests to the facts here involved shows affirmatively that the acquisition of control of Maryland by American General would not substantially lessen competition in violation of either Section 1 of the Sherman Act or Section 7 of the Clayton Act. We shall consider separately the relevant and undisputed facts relating to each of the three lines of commerce that Maryland asserts are involved.[25]

### A. Fire and Casualty Insurance

The companies in The Maryland Group are licensed to sell and are selling fire and casualty insurance in all the states of the Union and the District of Columbia. If American General should acquire control of Maryland the two

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[23] See Brown Shoe Co. v. United States, 370 U.S. 294, 322 n. 38, 343; United States v. Philadelphia National Bank, 374 U.S. 321, 364; United States v. Continental Can Co., 12 L.Ed. 2d 953, 965.

[24] As to the size and rank of the companies, see Brown Shoe Co. v. United States, 370 U.S. 294, 302-303, 331-332; United States v. Philadelphia National Bank, 374 U.S. 321, 366; United States v. Continental Can Co., 12 L.Ed. 2d 953. As to structure of the industry see Brown Shoe Co. v. United States, *id.* at 321-322; United States v. Continental Can Co., *id.* at 965.

[25] Maryland introduced no evidence on market shares and no evidence on the comparative size or rank of the companies. It introduced no evidence on industry structure except an affidavit which listed a number of mergers and acquisitions that had taken place in the insurance industry but which did not state any facts as to the market shares or comparative rank of the companies involved that would enable the court to make any judgment about the economic significance of these transactions (Pl. Ex. 13). In his closing argument counsel for Maryland admitted "that there are many companies in this field. There is competition. This cannot be disputed." (Tr. 673-674).

companies would operate throughout this area and any effects on competition would be felt throughout the area. For this reason we submit that the relevant geographical area for the purpose of determining market shares in the fire and casualty field is the entire United States.[26] In that area in terms of premiums the market position of The American Group in 1962 was approximately 0.12 percent and that of The Maryland Group 0.87 percent. The two groups combined would therefore have less than 1 percent of the market (Def. Ex. 6, p. 8).

Maryland contended that the market position of the two companies should be measured in the geographical area in which both groups now sell fire and casualty insurance which consists of 16 states and the District of Columbia. Although we deny that this is the relevant geographical market, even in that area the market position figure is inconsequential. On the basis of premiums the two companies combined would have 1.77 percent of the market (Def. Ex. 6, p. 10).

Neither The American Group nor The Maryland Group is included among the largest companies in the field. In 1963 The Maryland Group ranked 23rd among 112 leading fire and casualty groups in terms of premiums written and The American Group ranked 67th. The two groups combined would rank 19th. The total premiums of the groups combined would be less than 25 percent of the premiums written by the two largest fire and casualty groups and less than 50 percent of the premiums written by any of the next seven largest groups (Def. Ex. 6, pp. 6-7).

The fire and casualty industry is not marked by a high degree of concentration. There are approximately 3,330 fire and casualty companies in existence and in 1962 ap-

[26] See United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 599 (S.D. N.Y. 1958).

proximately 1,239 of these companies were large enough to be included in a standard reference work.[27] The industry is marked by ease of entry. Between 1947 and 1962 the number of larger fire and casualty companies listed in the standard reference work referred to above increased from 1,016 to 1,239 (Def. Ex. 6, pp. 2-5).

To support its argument that there would be a substantial lessening of competition in the fire and casualty business Maryland relies entirely upon the dollar volume of the premiums written by the two groups in the area in which they compete (Tr. 684-685).[28] It argues that because this amount is large that fact alone establishes that there would be an unlawful lessening of competition without regard to any questions of market position, relative rank and size, or structure of the industry. Neither the Supreme Court nor any other federal court has ever held that dollar volume figures standing alone are sufficient to establish a substantial lessening of competition. To sustain its argument Maryland relies principally if not solely upon *United States* v. *First National Bank,* 376 U.S. 665. That case does not hold that proof of dollar volume alone establishes a substantial lessening of competition. On the contrary the Court there based its holding on the ground that the standard of illegality established by its previous decisions "was met in the present case in view of the fact that the two banks in question *had such a large share of the relevant market*".(Emphasis supplied.) 376 U.S. 672. The figures set forth in the opinion of the Court to support this holding are not dollar volume figures but in every case are percentage figures showing the market position of the two companies involved and the market position

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[27] Best's Fire and Casualty Aggregates and Averages.

[28] The premiums amounted to approximately $29,669,223 for The American Group and to $69,576,607 for The Maryland Group (Pl. Ex. 11A, p. 14; Par. 20, Complaint).

of their competitors. 376 U.S. at pp. 668-669.[29] The fact that slightly less than two months after the decision of that case the Supreme Court in *United States* v. *Continental Can Co.*, 12 L.Ed. 2d 953, 965, said that "market shares are the primary indicia of market power" and that a merger "must be viewed functionally in the context of the particular market involved" is in itself enough to answer Maryland's contention.

**B. Accident and Sickness Insurance**

The Maryland Group and The American Group are both engaged in selling accident and sickness insurance in 42 states and the District of Columbia (Def. Ex. 6, p. 11). Maryland asserts that this area is the relevant geographical market (Tr. 681). In this area in terms of premiums The Maryland Group and The American Group would have only 33/100ths of 1 percent of the market (Def. Ex. 6, p. 11). Since accident and health insurance is written by both fire and casualty companies and by life insurance companies, there is no basis for any suggestion that in this line of commerce the two groups rank among the leaders in the industry or that the industry is concentrated, or is marked by an absence of competition or that there is not ease of entry. See pages 41-42, *supra*, and page 46, *infra*.

Here, as in the case of fire and casualty insurance, Maryland offered no evidence on asserted substantial lessening

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[29] In argument in the District Court, counsel for Maryland quoted a passage from the opinion in United States v. Union Pacific Railroad Co., 226 U.S. 61, 88, in support of its position. The passage is not pertinent. It was not addressed to the question of market shares but rather to a quite different contention made by defendants; *i.e.*, that the amount of business for which they competed was small in relation to the total amount of business of each. The facts in that case bear no relation to the facts here. There could be no dispute that the two railroads there involved were substantial factors in a relevant market; they were two of the larger railroads in the United States and two of the four or five railroads that at that time provided transcontinental rail service west of Chicago.

of competition except figures on the dollar volume of the premiums written by the two groups.[30] For the reasons that have been stated at pages 42-43, *supra*, the controlling decisions make it clear that these figures provide no basis for a determination that American General's acquisition of Maryland would substantially lessen competition in this line of commerce.

**C. Life Insurance**

In its arguments below, Maryland seemed to assume that simply because it was a potential competitor of American General in the life insurance business the acquisition of control by American General would violate the antitrust laws. There is no warrant for this assumption. The acquisition of a potential competitor may be unlawful under Section 7 of the Clayton Act if the facts establish that the acquisition may substantially lessen competition. See *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651.[31] But the acquisition of a potential competitor is no more illegal per se than is the acquisition of an existing competitor; the question in both cases is whether there may be a substantial lessening of competition.

Maryland presented literally no evidence that would support the conclusion that the acquisition of control by American General would substantially lessen competition in the life insurance industry. Since Maryland has never engaged in life insurance business it has no present mar-

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[30] In 1963 these premiums amounted to $6,177,000 for The American Group (Pl. Ex. 11A, pp. 11-12) and $4,263,908 for The Maryland Group (Pl. Ex. 21).

[31] In the *El Paso* case, El Paso was the only company supplying interstate natural gas to the California market and it supplied more than 50 percent of all of the gas consumed in that market (376 U.S. 652, n. 2). It acquired Pacific Northwest which at the time of the acquisition was the only other operating pipeline west of the Rockies; Pacific Northwest had ample supplies of natural gas and prior to the acquisition it had been negotiating contracts for specific amounts of natural gas at stated prices in the California market (376 U.S. 653-655, 658-659). There was ample basis for the Court's conclusion that the restraint on potential competition was substantial.

ket position in that industry. Maryland presented no evidence from which the court could determine what market position it might reasonably be expected to attain if it should enter the life insurance business or even what the dollar volume of its business might be. Maryland offered evidence with respect to a survey that it made in 1962 of the life insurance business handled by its fire and casualty agents and asserted that the survey showed that in 1961 those agents wrote life insurance in the face amount of approximately $400,000,000 (Tr. 284). The record does not disclose what this figure would mean in terms of premiums and Maryland offered no evidence to relate the figure in any way to the total market. The Statistical Abstract of the United States shows that in 1961 the face amount of all life insurance sold in the United States amounted to approximately $119,250,000,000.[32] Thus, the $400,000,000 figure represents approximately 33/100ths of one percent of the market.

Maryland does not claim that it would or could get the total amount of the life insurance business handled by its agents. Its own evidence shows that about 60 percent of the agents who responded to the survey stated that they would "consider" Maryland "as a source or a market for at least a portion" of their life insurance business (Tr. 284-285). The record shows that many of those agents now sell life insurance for several life insurance companies (Tr. 284). There is no basis for any supposition that they would divert all of this business to Maryland.

Maryland made no effort to prove how much of the life insurance business handled by its agents could be obtained by American General in the event that it acquired control of Maryland. Maryland's own evidence was that its fire and casualty agents were completely independent contractors who are free to place and do place both fire and

[32] Statistical Abstract of the United States, 1963, United States Department of Commerce, Bureau of the Census, p. 484, Table No. 645.

casualty and life insurance with a number of competing companies.[33] Maryland emphasized that this was particularly true of its "larger and better agents" (Tr. 300) who presumably do a substantial volume of life insurance business. Maryland's own proof thus undercuts any assumption that affiliation would enable American General to obtain anything like a major portion of the life insurance business now handled by the fire and casualty agents of Maryland. Thus there is such a complete failure of proof on the question of the alleged substantial lessening of competition in the life insurance business that Maryland cannot even resort to bare figures as to the dollar volume of premiums as it has attempted to do in the case of fire and casualty and accident and sickness insurance.

The evidence relating to American General's present position in the life insurance industry and to the structure of that industry is in itself enough to justify the conclusion that an affiliation between American General and Maryland will not substantially lessen competition. In 1962 in terms of premiums The American Life Companies had 0.42 percent of the market in the United States (Def. Ex. 6, p. 8).[34] In 1963 The American Life Companies ranked approximately 55th among all life insurance companies in terms of insurance in force and had less than one-half of 1 percent of the life insurance in force in the United States (Def. Ex. 6, p. 7). In 1962 there were more than 1400 life insurance companies operating in the United States. The industry is characterized by keen competition, by a moderately declining trend in concentration, and by ease of entry (Def. Ex. 6, pp. 3-6).

In light of the facts that have been set forth above, we submit that Maryland has made no showing whatso-

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[33] Maryland's assertion that in the event of the affiliation American General would obtain life insurance by coercive or tying practices failed completely for want of proof. See pages 24-25, *supra*.

[34] Maryland concedes that the relevant geographical market for life insurance is the entire United States (Tr. 681).

ever that the acquisition of Maryland by American General could substantially diminish competition in the life insurance industry.

### D. The Authorities Cited by Maryland Do Not Support Its Contentions

Maryland has cited no decision in which the Supreme Court or any lower federal court has held a merger or acquisition unlawful under either Section 1 of the Sherman Act or Section 7 of the Clayton Act in which the market percentage figures were as low as they are here, in which the rank and size of the companies involved are as small as they are here; and in which the merger or acquisition occurred, as it does here, in the context of an industry characterized by keen competition among a large number of units and in which there is ease of entry and no tendency to concentration. A review of the decisions cited by Maryland in the court below discloses that the facts in those cases are in no degree comparable to the facts here. In each of those cases the market position of the companies involved was substantially greater than it is here, the companies were among the leaders in the market and the market was marked by a high degree of concentration.[35]

The facts in the cases cited by the appellant in which the lower federal courts granted preliminary injunctions in merger or acquisition cases likewise bear no resemblance to the facts here. For example, in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953), the acquiring company had 9½ percent of the national market and the acquired company had 11 percent; thus the two companies combined would have had in excess of 20 percent of the market. The ac-

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[35] On the issue of substantive illegality, Maryland, in the court below, relied principally upon Brown Shoe Co. v. United States, 370 U.S. 294; United States v. El Paso Natural Gas Co., 376 U.S. 651; United States v. Penn-Olin Chemical Co., 12 L.Ed. 2d 775; United States v. Aluminum Co. of America, 12 L.Ed. 2d 314; and United States v. First National Bank, 376 U.S. 665.

quiring company was the fifth largest in the industry; the acquired company was the fourth largest, and 90 percent of the market was concentrated in six companies. 114 F. Supp. at pp. 310-311. In *Briggs Mfg. Co.* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich.), *aff'd, Crane Co.* v. *Briggs Mfg. Co.*, 280 F. 2d 747 (6th Cir. 1960), Briggs had 6 percent of the relevant market and Crane had 10 percent so the two companies together would have had a market position of 16 percent. Briggs was the sixth ranking company in the industry; Crane was the fifth. The market was controlled by ten companies, and there had been no new entries for ten years. 185 F. Supp. at pp. 179-180, 184. In *Muskegon Piston Ring Co.* v. *Gulf & Western Industries, Inc.*, 328 F.2d 830 (6th Cir. 1964), the District Court found as a fact the two companies combined would have in excess of 8 percent of one relevant market and in the immediate future would have in excess of 20 percent of another relevant market. The court also found that six or seven manufacturers accounted for approximately 90 percent of the market but only four of these companies were "independent", that the acquisition would reduce the number of "independents" to three, and that there was a trend toward concentration in the industry.[26]

In contrast the district courts in a number of cases have refused to grant preliminary injunctions even though the plaintiffs in those cases made a far stronger showing that the merger or acquisition would have a substantial effect on competition than Maryland has made here. For example, in *United States* v. *Brown Shoe Co.*, 1956 Trade Cas. ¶ 68,244, p.71,117 (E.D. Mo. 1956), the District Court refused to grant a preliminary injunction even though Brown was the third largest seller of shoes in the

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[26] The findings of fact made by the District Court are not set forth in the reported opinion of the United States Court of Appeals for the Sixth Circuit. They may be found in the Appendix to Appellant's brief in that court. The relevant findings of fact are 6-17 and may be found at pages 289A-292A of that Appendix.

country and the Kinney Company was the eighth largest and on the facts involved the Supreme Court ultimately held the acquisition unlawful. In *United States* v. *Crocker-Anglo National Bank,* 223 F. Supp. 849 (N.D. Cal. 1963), a three judge district court refused to grant a preliminary injunction even though the two banks combined would have approximately 9 percent of the relevant market and would be the fourth ranking bank in the relevant area. 223 F. Supp. at p. 853. In *United States* v. *Gimbel Brothers, Inc.,* 202 F. Supp. 779 (E.D. Wis. 1962), the District Court refused to grant a preliminary injunction to prevent Gimbel Brothers, which operated the largest department store in Milwaukee, from acquiring the second largest store in the same area.[37] In *E. L. Bruce Co.* v. *Empire Millwork Corp.,* 164 F. Supp. 446 (S.D.N.Y. 1958), the District Court refused to grant a preliminary injunction even though the plaintiff's evidence showed that the two companies combined would have had a market position of approximately 13 percent. 164 F. Supp. at p. 448.

There is no substance in Maryland's alleged cause of action under the antitrust laws. In *H. E. Fletcher Co.* v. *Rock of Ages Corp.,* 326 F.2d 13, 17 (2d Cir. 1963) where the court held that a preliminary injunction had been improvidently granted in an antitrust case, Judge Friendly made a statement which, if an appropriate change were made in the description of the parties, would apply with particular force to the present controversy:

> "Despite the conventional antitrust trappings with which the case has been draped, what we have here, so far as the papers show, is essentially a private squabble between two sets of energetic Yankee businessmen."

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[37] The facts with respect to the size of the companies involved in this case do not appear in the opinion of the District Court but are set forth in paragraphs 16 and 18 of the complaint filed by the United States.

## CONCLUSION

For all of the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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August 12, 1964.

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# REPLY BRIEF OF APPELLANT, MARYLAND CASUALTY COMPANY

In The
UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

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No. 18,802

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United States Court of Appeals
for the District of Columbia
FILED AUG 17 1964
Nathan J. Paulson
CLERK

MARYLAND CASUALTY COMPANY,

Appellant

v.

AMERICAN GENERAL INSURANCE COMPANY, et al.,

Appellees

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On Appeal from the United States District
Court for the District of Columbia

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# REPLY BRIEF OF APPELLANT, MARYLAND CASUALTY COMPANY

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The very ably written brief for appellees narrows the issues which this Court is called upon to decide. While giving token support to the District Court's finding that Maryland had failed to make the requisite showing on the merits of its cause of action, the main thrust of appellees' brief relates to the questions whether the relief granted by the District Court was adequate to protect Maryland from immediate irreparable injury and, if not, whether an injunction against proceeding with the proposed exchange offer would have helped to do so. It would hardly have been consistent for the appellees to take any other position, since, at the hearing below, they tendered a unilateral stipulation and a draft of a preliminary injunction which the lower Court adopted. By

making this tender, appellees impliedly conceded that relief by way of a preliminary injunction was appropriate, and, by the same token, they admitted that there had been a sufficient showing of a probable violation of the antitrust laws.

The terms of the tendered injunction make it clear that Maryland would suffer immediate irreparable injury if American General were now permitted to take control of Maryland's management and operations. Appellees no longer really dispute this. What they now contend is that such injury would not result from the mere acquisition of a controlling stock interest in Maryland, and that in any event whatever injury might result from such an acquisition could not be prevented by the granting of a preliminary injunction.

It would serve no useful purpose to reiterate here the reasons outlined in Maryland's brief why Maryland will suffer immediate irreparable injury if American General is permitted to proceed with its exchange offer. The principle injury to Maryland results from the fear of Maryland's agents that a take over of Maryland by American General will result in changes in Maryland's management and policies which will be detrimental to Maryland's agents. The record leaves no doubt that this apprehension is real, that it is based on reasonable grounds and that it is not to be allayed by pious but carefully qualified expressions of an intention on the part of American General not to interfere in such matters except as "good business practice" may dictate. Pl. Ex. 11-A, p. 3. By the same token, the record is clear that the unrest of Maryland's agents, by virture of which Maryland is already suffering incalculable but substantial injury, will not be cured by the preliminary injunction tendered by appellees and

adopted by the District Court.

Appellees impliedly suggest that this injury is not immediate, since it is based on fear of something which has not yet happened, but as any follower of the stock market knows to his cost, immediate irreparable injury can and does result from just such apprehensions. Appellees' only real contention is that the preliminary injunction sought by Maryland would be just as ineffective to protect Maryland from any injury which it would suffer if the exchange offer is permitted to proceed as is the injunction issued by Judge McGarraghy. For until the litigation is finally terminated, so the appellees assert, Maryland's agents will continue to be restive and the injuries resulting from such restiveness will continue.

The answer to this argument was given by the Executive Vice President of Maryland, Charles H. Peterson, who is in charge of agency relationships for that company. Mr. Peterson has had a lifetime of experience in dealing with the agents of Maryland and is in a unique position to predict their reactions. When this precise question was put to him by counsel for appellees, he pointed out that there was a world of difference between the possibility that at some future time American General might succeed in acquiring enough stock to control Maryland's management and policies, on the one hand, and, on the other, the situation that would exist if American General were now permitted to acquire stock control of Maryland but temporarily prevented from exercising it. In the first case he felt sure that agency unrest with its concomitants of loss of personnel and loss of business could be controlled. In the latter case, as he put it, "we have got the axe over our head," and the agents could not be restrained from running for cover. Tr. 298, 3[illegible]-316, 320.

We submit that Mr. Peterson's testimony is supported by common experience. The possibility of mergers and acquisitions is one of the normal hazards of contemporary business life. This is particularly true in the insurance field where, as Professor Trosper has shown, the transactions in recent years have been increasingly frequent. The fact that American General has announced its desire to acquire Maryland doubtless makes the possibility of such an acquisition more imminent, but it still continues to be only a possibility. If, however, American General is now permitted actually to acquire a controlling stock interest in Maryland, the agents will be faced not by a possibility but by a reality. The distinction is vital, and it is because Maryland earnestly believes in the importance of the distinction that the present appeal is being pressed. In our opinion, the record is clear that Maryland will suffer immediate irreparable injury from the acquisition by American General of a controlling stock interest in Maryland, and that a temporary restraint on the exercise of stock control by American General after it has once been acquired, such as is provided by the injunction issued by Judge McGarraghy, will not prevent that injury. We therefore submit that this Court should take whatever steps may be required to minimize that injury. One such step is to enjoin American General from continuing its exchange of stock until Maryland has had the opportunity to prove the facts alleged in its complaint which, if proven, we submit, would establish a violation of the antitrust laws by appellees.

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Dated: August 17, 1964

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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,802

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v.

AMERICAN GENERAL INSURANCE COMPANY, ET AL.,
*Appellees*.

## REPLY BRIEF FOR APPELLEES

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August 17, 1964

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 18,802

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## REPLY BRIEF FOR APPELLEES

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The substance of the principal arguments made in Maryland's brief has been dealt with in the brief previously filed for appellees. This reply will therefore be confined to a few points as to which some brief additional discussion may be of assistance to the Court.

## I. MARYLAND'S ARGUMENTS ON IRREPARABLE INJURY DO NOT JUSTIFY REVERSAL

### A. The Alleged Interference with Maryland's Plans for Entering the Life Insurance Business

In our principal brief (pp. 31-32) we pointed out that the alleged uncertainties which Maryland asserts interfere with its plans for entering the life insurance business will necessarily continue until a final determination on the merits and are therefore uncertainties that cannot be removed by any preliminary injunction that could properly be granted. In its brief Maryland now concedes that these uncertainties will continue until there has been a final determination on the merits. It asserts that it is foreclosed from entering the life insurance field "so long as American General has the power at some future time to take control of Maryland" (Brief, p. 11).[1] Maryland objects to paragraph 4 of the preliminary injunction, which prohibits American General from interfering with Maryland's plans to go into the life insurance business, on the ground that the provisions of the paragraph "are temporary and are not effective after the final determination of the suit" (Brief, p. 26). These and similar assertions show beyond any doubt that Maryland is now asking this Court to frustrate the exchange offer completely and to eliminate any future possibility that American General could take over Maryland Casualty. Nothing short of a final determination on the merits would achieve this result. The authorities cited at page 37

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[1] See also Appellant's Brief p. 15: "• • • It will be impossible for it to activate this subsidiary while it is threatened with a take over by American General" and p. 16: "• • • no person of executive caliber would relinquish his present position in order to take a position as head of the Life Insurance Company of Maryland, Inc., when the future existence of that position, in fact of the company itself, was hanging in the balance."

of our principal brief establish that it would have been an abuse of discretion for the District Court to have issued a preliminary injunction that gave Maryland such drastic and unprecedented relief.[2]

### B. Maryland's Alleged Loss of Business

Maryland argues that it is threatened with "immediate" irreparable injury because of the possible loss of business (Brief, pp. 17-18). It describes this alleged loss of business as "the natural effect of the unrest and apprehension on the part of the agents" (p. 17). The argument is therefore merely one aspect of Maryland's broader argument that the preliminary injunction granted by the District Court does not effectively protect it against irreparable injury caused by disruption of its relations with its agents. We have discussed this argument in detail in our principal brief (pp. 22-30) and there pointed out that Maryland's own evidence relates the claimed "unrest and apprehension" on the part of its agents to the fear that the management, personnel, practices and policies of Maryland will be changed.[3] These events are prohibited by the preliminary injunction granted by the District Court. That injunction therefore effectively protects Maryland against any possible disturbance of

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[2] Maryland's claim that it will suffer "immediate" irreparable injury unless it is allowed to go into the life insurance business at once should be weighed in the light of the fact that after incorporating its life insurance company it took no steps whatsoever to activate that company for nearly two years (Tr. 182-183).

[3] The testimony quoted by Maryland at p. 17 of its brief emphasizes the point. The witness, speaking of the agents, said: "• • • I think they would be apprehensive about a change, some change that might take place with respect to the underwriting policies, acceptability business, the handling of it."

its relationships with its agents and any possible consequent loss of business.

Furthermore, in view of the actions and statements of the management of Maryland the District Court was entitled to view with some skepticism its claims with respect to loss of business. On June 15, 1964, the Board of Directors of Maryland increased its cash dividend by 20% and on the same day sent the following letter to its stockholders:

> "To Our Stockholders:
>
> I am pleased to inform you that the Board of Directors today increased your Company's regular quarterly dividend rate from 50 cents per share to 60 cents per share. On an annual basis, this is an increase from $2.00 to $2.40.
>
> The Directors felt that this 20% increase is justified by the marked improvement in the Company's underwriting results and investment income.
>
> For the first four months of this year, the Company's consolidated operating results showed an improvement of $4,500,000 over the corresponding period of last year. *We have every reason to expect a continuance of this trend.* [Emphasis supplied]
>
> The higher dividend is payable October 20, 1964, to shareholders of record on October 9, 1964.
>
> Sincerely yours,
>
> H. E. Miller
> *President*"

(Def. Ex. 10)

This letter was written more than a month after it was known that American General would make a public exchange offer to the stockholders of Maryland, twenty-five days after the filing of a registration statement with the Securities and Exchange Commission,

after Maryland had sent two letters to its stockholders and had circularized its agents attacking the exchange offer, and about three weeks before the filing of the complaint herein.

### C. The Alleged Misinterpretation of the Position of Maryland and of Maryland's Agents by the District Court

Appellant argues that the District Court misinterpreted the position of Maryland and of Maryland's agents because in its memorandum opinion it stated that it seems unlikely that the officers of Maryland would have participated in the negotiations between the two companies "and, indeed, made their own proposal of terms if, in fact, the stock acquisition by defendants would cause the damage to plaintiff such as the officers now say would result" (Brief, p. 18). Appellant bases this argument on the ground that throughout the negotiations it insisted that there should not be a "take-over" of Maryland by American General (*Id.* p. 19).[4]

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[4] Appellant concedes that the formal proposal of American General on January 14, 1964, did provide for a stock acquisition as is now contemplated in the stock exchange offer (Brief, p. 20). On January 20, Miller of Maryland acknowledged receipt of the proposal set forth in the letter of January 14 and informed Wortham of American General that "our Executive Committee will meet the week of January 26, and our Board on February 4" and that the proposal would be submitted at such meetings. Subsequently, on February 5 Miller wrote Wortham that his proposal as submitted by letter of January 14 was discussed at a regular meeting of the Maryland Board of Directors, and that after full discussion "The Board voted that a committee of its members be appointed to make a further study". Later the committee of the Maryland Board arranged for a meeting with the committee of the American General Board in Washington for the purpose of discussing the American General proposal and at the meeting the Maryland committee made a counter proposal which contemplated that the shareholders of American General and Maryland would exchange their stock for shares in a new holding company which

Appellant misconceives the nature of the conclusion that the District Court drew from these negotiations. The key words in the District Court's conclusion are that "* * * It seems unlikely to me that these officers would have participated in such negotiations and, indeed, made their own proposal of terms if, in fact, the stock acquisition by defendants *would cause the damage to plaintiff such as the officers now say would result; * * *.*" [Emphasis supplied.] The damage which the officers of Maryland "now say would result" is alleged injury that they assert would arise from the mere acquisition of title to Maryland stock even though any take-over or exercise of control is enjoined *pendente lite*. What the District Court held was that Maryland's conduct in the negotiations indicates that it did not fear irreparable injury from the mere acquisition of stock but was concerned about what might follow a take-over or the actual exercise of control by American General. This conclusion is fully supported by the evidence and justifies the Court's holding that the preliminary injunction granted effectively protects Maryland against any possible injury.

### II. THE DISTRICT COURT PROPERLY BALANCED THE EQUITIES

Maryland asserts that the trial court failed to balance the equities (Brief, p. 26). This assertion is incorrect. The District Court balanced the irreparable

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was to be created. Following the meeting the parties terminated negitiations and Miller wrote Wortham on March 31 that he would advise the annual meeting of the Maryland stockholders that "any formal offer of exchange of stock would have to be made by your company to our individual stockholders". Accordingly, when Woodson and Miller met in New York on April 20 and Miller outlined certain conditions for any further negotiations, the parties had previously terminated all negotiations (Def. Ex. 3, pp. 4-10).

injury shown by American General against Maryland's failure to show any possible irreparable injury that could be caused by the mere acquisition of title to stock and on that basis properly denied an injunction against the Offer of Exchange itself. Thus the District Court specifically found that Maryland's evidence showed that any possible injury threatened to Maryland would be prevented by the preliminary injunction which the Court issued and that Maryland would not suffer any irreparable injury by reason of American General carrying out the proposed offer of exchange and thereafter holding any common stock of Maryland acquired subject to the terms of the preliminary injunction (Findings of Fact 32, 35). The Court found in contrast that if the exchange itself were enjoined that it would be completely frustrated and American General would be forced to withdraw the offer (Finding of Fact 36) with resultant losses in the value of their stock to shareholders of Maryland and the loss of some $485,000.00 in cost and expenses to American General (Findings of Fact 37-38).

Maryland's assertion that the denial of a preliminary injunction prohibiting the exchange of stock "in effect, determined the merits of the case against Maryland" (Brief, p. 27) is specious on its face. Maryland is protected against any take-over by American General or interferences of any kind with its personnel, practices or customs. Its management will be in a position to conduct the affairs of the corporation as it thinks best, completely independent of American General, and will be free to litigate this case to a final determination on the merits.

## III. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT MARYLAND HAD FAILED TO MAKE THE REQUIRED SHOWING ON THE MERITS

In its argument on the merits of its cause of action Maryland cites no case in which a merger or acquisition has been held unlawful on facts that even remotely resemble those in the case at bar. Maryland explicitly concedes this point as to Section 7 of the Clayton Act: "We readily acknowledge that in these respects, the case at bar does indeed differ from any case heretofore decided under Section 7—the market positions being lower, the shares of market smaller and the number of competitors larger" (Brief, pp. 47-48).[5] The same admission is implicit in Maryland's discussion of the decisions under Section 1 of the Sherman Act. Maryland continues to argue, however that *United States* v. *First National Bank & Trust Company of Lexington*, 376 U.S. 665, establishes a broad principle that the question whether an acquisition will substantially lessen competition can and should be determined solely by reference to dollar volume figures and without regard to market shares, the relative size and rank, number of competitors, or the structure of the industry. Maryland cannot deny that the Supreme Court did not rely upon dollar volume figures in that case but instead relied entirely upon percentage figures showing the market shares of the two companies involved and of their competitors. Nor can Maryland deny that the Court described these percentage figures as "the facts relevant to the alleged restraint of trade under the Sherman Act (376 U.S. at p. 668)—Maryland therefore attempts to dismiss this aspect of the

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[5] Maryland's description of the holding in United States v. Aluminum Co., 12 L. Ed. 2d 314, is incomplete (Brief, p. 49). It is true that the acquired company had only 1.3% of the market. But Alcoa, the acquiring company was the leading producer and already had 27.8% of the market (*Id.* at p. 319).

Court's opinion on the curious ground that "* * * the Court was simply reciting the facts of the case with which it was dealing" (Brief, p. 35) as if the holding of the Court could in some way be disassociated from the facts to which it was directed. Maryland also attempts to support its reading of the *Lexington Bank* opinion by referring to four cases involving combinations of railroads which were discussed in that opinion. The short answer to the conclusions that Maryland attempts to draw from these railroad cases is provided by a passage in the Supreme Court's opinion in which it relates the holdings in those cases to the facts before it. The Court said (376 U.S. 671-672):

> "The four railroad cases at least stand for the proposition that where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act. *That standard was met in the present case in view of the fact that the two banks in question had such a large share of the relevant market.*" [Emphasis supplied.]

In short, the Supreme Court expressly said that the four railroad cases applied because "the two banks in question had such a large share of the relevant market".

Maryland has cited no case in which a merger or acquisition has been held to substantially lessen competition simply on the basis of dollar volume figures.[6]

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[6] Maryland cites International Salt Co. v. United States, 332 U.S. 392 (Brief, p. 38). That case, which involved a tying contract, is inapposite. Tying contracts, unlike acquisitions or mergers, are "unlawful in and of themselves". See Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6. There are no tying contracts involved in this case.

In *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, the Supreme Court expressly rejected the argument that the question whether a transaction substantially lessens competition can be determined simply on the basis of dollar volume figures. The Court held that a requirements contract that affected 1% or less of a relevant market did not violate Section 3 of the Clayton Act and in so holding said, 365 U.S. 333-334:

> "It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $128,000,000, and that this 'is, of course, not insignificant or insubstantial.' While $128,000,000 is a considerable sum of money, even in these days, the dollar volume, by itself, is not the test, as we have already pointed out."

## CONCLUSION

Maryland's brief exposes the real nature and purpose of the relief that it seeks on this appeal. Its position on the subject of irreparable injury is now based largely on the assertion that it should be relieved of the uncertainty that will necessarily exist prior to the ultimate determination of the legality of the transaction which is the subject of the litigation.

Maryland makes no showing that the mere taking of title to Maryland stock and the holding of that stock subject to the terms of the preliminary injunction during the pendency of the suit, in itself, would be harmful to Maryland.

It is apparent that the injunction which Maryland seeks is not in fact designed merely to prevent the exchange offer from going forward pending a trial on the merits, but is rather designed to serve an altogether different end—*i.e.*, the permanent destruction of the proposed transaction. The evidence shows and the

court below found that such an injunction would have the effect of forcing American General to abandon the contemplated transaction nor merely *pendente lite* but permanently. Maryland itself concedes this point. It asserts (Brief, p. 30):

> "The only injury which the defendants could suffer by reason of the granting of the preliminary injunction would be the frustration of the merger with the loss of the expenses already undertaken to put it through."

It is not the function of a preliminary injunction finally to dispose of a controversy. Maryland is here in effect praying for the issuance, prior to trial, of a final injunction disposing of the controversy in its favor. The District Court properly refused to grant Maryland permanent relief in the guise of a preliminary injunction.

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